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NO.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

LEONARD SHANE,

Petitioner,

vs.

RESOLUTION TRUST CORPORATION, AS RECEIVER OF MERCURY SAVINGS AND LOAN ASSOCIATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the Ninth Circuit's decision conflict with this Court's decision in *Nachman Corp. v. Pension Benefit Guarantee Corp.*, 446 U.S. 359, 100 S. Ct. 1723, 64 L. Ed. 2d 354 (1980) given that Plaintiff/Petitioner Leonard Shane's ("Shane") rights to retirement benefit payments from a supplemental executive retirement plan (the "Plan") had vested before the RTC seized Mercury and no conditions precedent existed which could have prevented Shane from receiving his retirement benefits?

2. Does the Ninth Circuit's decision contradict the Second Circuit's decision in *Healy v. Rich Products Corp.*, 981 F.2d 68 (2d Cir. 1992) because the

Ninth Circuit refused to consider uncontroverted parol evidence pursuant to applicable contract interpretation rules to explain the meaning of "vested" which the Plan does not define?

3. Does the Ninth Circuit's decision contradict the Sixth Circuit's decision in *Federal Savings & Loan Ins. Corp. v. Quinn*, 922 F.2d 1251 (6th Cir. 1991) because material factual issues exist about whether Shane was entitled to receive his pension benefit payments when the RTC retained Shane as an employee after the RTC became Mercury's receiver?

4. Assuming that 12 C.F.R. §563.39 regulating thrift association employment contracts applies to the Plan, isn't Shane still entitled to receive his

pension benefit payments from the Plan if his rights to the pension benefits had vested prior to the RTC becoming Mercury's receiver?

5. Does the Ninth Circuit's decision conflict with this Court's *HCSC-Laundry v. United States*, 450 U.S. 1, 101 S. Ct. 836, 67 L. Ed. 1 (1981) line of cases because the Ninth Circuit failed to interpret and apply the specific statute -- 12 C.F.R. §563.47 -- which applies to the Plan and Shane's rights thereunder?

LIST OF PARTIES

The parties to the proceedings below were Plaintiff/Petitioner Leonard Shane ("Shane") and Defendant/Respondent Resolution Trust Corporation as Receiver for Mercury Savings and Loan Association ("RTC").

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No.

IN THE
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October Term 1993

LEONARD SHANE,

Petitioner

versus

RESOLUTION TRUST CORPORATION, AS RECEIVER OF MERCURY SAVINGS AND LOAN ASSOCIATION,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

The Petitioner Leonard Shane respectfully requests that this Court issue a writ of certiorari reviewing the judgment and opinion of the United States Court of Appeals for the Ninth Circuit Court, entered in the above-entitled proceeding on August 30, 1993.

OPINIONS BELOW

The Memorandum Opinion of the Court of Appeals for the Ninth Circuit has not been reported. A copy of the Ninth Circuit's Memorandum Opinion is included as Appendix "A", *infra*.

The United States District Court for the Central District of California did not issue an opinion containing findings of fact and conclusions of law. However, a copy of the Central District's Order granting the RTC's Rule 56 summary judgment motion is included as Appendix "B", *infra*.

JURISDICTION

Invoking federal jurisdiction under 12 U.S.C. §1421(a), petitioner Shane brought this suit in the Central District of California. On September 20, 1991, the Central District issued an order granting respondent RTC's Rule 56 motion for summary judgment. *See* Appendix "B", *infra*.

Thereafter, petitioner Shane appealed to the Ninth Circuit which affirmed the Central District. Shane then petitioned the Ninth Circuit for a rehearing. On August 30, 1993, the Ninth Circuit denied petitioner Shane's petition for a rehearing. See Appendix "C".

The jurisdiction of this Court to review the Ninth Circuit judgment is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

1. 12 C.F.R. §563.39. Employment Contracts. A copy of 12 C.F.R. §563.39 is included as Appendix "D", *infra*.

2. 12 C.F.R. §563.47 Pension Plans. A copy of 12 C.F.R. §563.47 is included as Appendix "E", *infra*.

3. 12 U.S.C. §1821(e). Provisions Relating to Contracts Entered into Before Appointment of Conservator or Receiver. A copy of 12 U.S.C. §1821 is included as Appendix "F", *infra*.

STATEMENT OF THE CASE

This is an action for breach of contract and declaratory relief brought by Shane against the RTC for pension benefits Shane earned for his over 26 years of service to Mercury Savings and Loan Association ("Mercury"), a California state-chartered savings and loan association. Shane filed his complaint seeking damages resulting from the RTC's refusal to pay Shane these benefits.

Shane served as the Chief Executive Officer of Mercury and as Chairman of its Board of Directors from approximately April 1964 through February 1990. Effective November 1983, the Board established a Supplemental Executive

Retirement Plan (the "Plan") to assure key employees adequate funds with which to retire.

In pertinent part, the Plan provides that benefits under the Plan would "accrue or vest" when Shane reached "pay status".

> Notwithstanding any of the provisions of the plan, no benefit shall accrue or vest hereunder with respect to any executive or beneficiary until such benefit is in pay status.

The Plan does not define the terms, "accrue" or "vest", or the phrase, "pay status."

The Plan was unqualified, but Mercury accrued on its books a liability for the amount of each participant's benefits once the benefits were vested.[1] As Shane, the Plan's Administrator, and the Plan's Actuary all understood it, Shane's rights became vested under the Plan when he turned sixty-five (65) on May 28, 1987. However, instead of retiring at the age of sixty-five (65), Shane stayed on as Chief Executive Officer of Mercury.

Nevertheless, according to the Plan's Actuary, KPMG Peat Marwick

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[1] In September 1988, Mercury's Board voted to terminate all of its pension plans, in part, because of an imminent change in the tax laws. To effect this, the Plan's Administrator, Dotson Bennett, was to determine the benefit liability for all six (6) Plan participants (including Shane), accrue that amount on Mercury's books, and reach a settlement with each participant. Bennett discovered, however, that he could not execute the Board's instructions because the Board had terminated the Plan before accruing and setting aside sufficient funds for the Plan. Accordingly, at its December 1988 meeting, the Board reinstated the Plan to permit the appropriate accruals for its participants.

partner, James Colburn, and Shane himself, Shane's right to benefits vested, meaning he could have received benefits upon his retirement, or, with the Board's approval, before he retired. The right to benefits was unconditional and could not be taken away from Shane upon the occurrence or nonoccurrence of any event.

While the Plan was unqualified, Mercury was required to and did accrue in a separate account sufficient funds to meet its obligations to its vested participants. By the fourth quarter in 1989, the Plan became fully funded. Shane elected not to receive any benefits at that time to which he was entitled, but decided to allow Mercury full use of

his benefit monies (approximately $844,000.00) until a later time.

After over 26 years of service, Shane proposed to retire from Mercury effective February 28, 1990. However, Mercury was taken over by the federal regulators on February 23, 1990.

At the request of James Klingensmith, Managing Agent for the RTC, Mercury's Conservator, Shane stayed on in his capacity as Chief Executive Officer and Chairman of Mercury. The RTC designated Shane's status as a fully paid administrative leave. Thereafter, James Zemcik replaced Klingensmith. He denied Shane's claim for his retirement benefits (the only Plan participant denied benefits), and this action proceeded.

In July 1991 the RTC moved for summary judgment. It argued that Shane's breach of contract claim was preempted by ERISA (29 U.S.C. §1001, et. seq.). The RTC also argued that Shane could not state a claim under ERISA because he had no vested rights to benefits under the automatic termination provisions in 12 C.F.R. §563.39.[2]

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[2] 12 C.F.R. §563.39 provides in relevant part:

> (a) General. A savings association may enter into an employment contract with its officers and other employees only in accordance with the requirements of this section. . . . An association shall not enter into an employment contract with any of its officers or other employees if such contract would constitute an unsafe or unsound practice. The making of such an employment contract would be an unsafe or unsound practice if such contract could lead to material financial loss or damage to the association. . . .
>
> (b) Required provisions. Each employment contract shall provide that:
>
> (5) All obligations under the contract shall be terminated, except to the extent determined that continuation of the contract is necessary of [sic] the continued operation of the association . . . when the association is determined by the Director to be in an unsafe or unsound condition. Any rights of the parties that have already vested, however, shall not be affected by such action. [emphasis added].

Based on this regulation, the RTC argued that since Shane still could be terminated for cause, a condition precedent existed which prevented his pension rights from vesting.

The Central District of California granted the RTC's summary judgment motion in a brief minute order. The Central District's analysis consisted of the following opinion: "there is no genuine issue as to any material fact." The Central District did not provide findings of fact or conclusions of law. On October 22, 1991, Shane timely filed his notice of appeal in the Ninth Circuit.

On appeal, Shane argued that material issues of fact existed about whether Shane's rights had vested under

the Plan. First, he argued that his rights vested under §563.39 because no conditions precedent existed preventing Shane from receiving his pension benefits. Instead, the only remaining condition was a condition subsequent -- that Shane not be terminated for cause. Second, Shane argued that by retaining him as a post-takeover employee, the RTC had made a determination under §563.39 to continue his benefits under the Plan. Moreover, Shane argued that 12 C.F.R. §563.47 which specifically applies to pension plans should be applied instead of §563.39.[3]

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[3] In pertinent part, §563.47 provides that:

> (a) General. No savings association or service corporation thereof shall sponsor an employee pension plan which, because of unreasonable costs or any other reason, could lead to material financial loss or damage to the sponsor. For purposes of this section, an employee pension plan is defined in section 3(2) of the Employee Retirement Income Security Act of 1974, as amended. The prospective obligation or liability or a plan sponsor to each plan participant shall be

The Ninth Circuit Court affirmed the judgment on June 30, 1993. The Ninth Circuit summarily applied §563.39, ignored §563.47 and reasoned that because Shane was not receiving pension benefits when the RTC seized Mercury, Shane's pension benefits were not vested, and therefore, the RTC could repudiate the Plan.

On July 14, 1993, Shane filed his petition for a rehearing by the Ninth Circuit. On August 30, 1993, the Ninth Circuit denied Shane's Petition for a Rehearing. Petitioner Shane now files this petition seeking a writ of

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stated in or determined from the plan, and, for a defined benefit plan, shall also be based upon an actuarial estimate of future experience under the plan.

(d) Termination. The plan shall permit the sponsor's board of directors and its successors to terminate such plan. Notice of intent to terminate shall be filed with the District Director at least 60 days prior to the proposed termination date.

certiorari reviewing the Ninth Circuit's judgment and opinion.

REASONS FOR GRANTING THE WRIT

The Ninth Circuit's decision in this action contradicts this Court's decision in *Nachman Corp. v. Pension Benefit Guarantee Corp.*, 446 U.S. 359, 100 S. Ct. 1723, 64 L. Ed. 2d 354 (1980); the decision of the United States Court of Appeals for the Second Circuit in *Healy v. Rich Products Corp.*, 981 F.2d 68 (2d Cir. 1992); the decision of the United States Court of Appeals for the Sixth Circuit in *Federal Savings and Loan Ins. Corp. v. Quinn*, 922 F.2d 1251 (6th Cir. 1991); and, this Court's decision in *HLSC-Laundry v. United States*, 450 U.S. 1, 101 S. Ct. 836, 67 L. Ed. 1 (1981). Moreover, the Ninth Circuit misconstrued §563.39 and §563.47.

These decisions, the law interpreting §§563.39 and §563.47 and the ambiguities in the meaning of the terms "vested" and "pay status" in the Plan establish that material fact issues exist. These issues should have precluded the Ninth Circuit from affirming the Central District's entry of summary judgment against Shane on his claims for pension benefits.

I. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S *NACHMAN* DECISION BECAUSE PETITIONER SHANE'S RIGHTS VESTED BEFORE THE RTC SEIZED MERCURY AND NO CONDITIONS PRECEDENT EXISTED PREVENTING SHANE FROM RECEIVING HIS PENSION BENEFITS.

In *Nachman*, this Court interpreted the meaning of "nonforfeitable" as that term is used in ERISA for the purpose of determining whether the respondent in that case, Pension Benefits Guarantee Corporation, had a right to reimbursement from the petitioner employer for insurance paid to cover nonforfeitable benefits. In *Nachman*, the employer terminated its pension plan just before much of ERISA became effective. *Nachman*, 446 U.S. at 363-364. When the employer

did so, the plan had assets sufficient to pay only a portion of the employee's vested benefits. *Id.* at 365. The pension plan in *Nachman* contained a limitation of liability clause which allowed the employer to terminate the plan and to distribute only the funds available in the plan at the time of termination without having to provide additional funds. *Id.* at 364.

This Court defined the issue in *Nachman* as "whether petitioner's employees' benefits are nonforfeitable under the terms of the plan within the meaning of §4022(a) of the Act." *Id.* at 369. It concluded that they were.

Justice Stevens explained at various points in his opinion why these were

"nonforfeitable pension benefit[s]." First, after focusing on the meaning of the word "claim" as discussed in ERISA's legislative history, *id.* at 371, n. 15., he concluded that "it is the claim to the benefit, rather than the benefit itself, that must be unconditional and legally enforceable against the plan." *Id.* at 371. Since the claims to the benefit in *Nachman* were unconditional, the claims were legally enforceable against the Plan. This court noted that the entire legislative history underlying ERISA supported the conclusion that the terms "vested" and "nonforfeitable" were used "synonymously." *Id.* at 375.

Next, relying upon regulations promulgated by the respondent, Justice Stevens found that the benefits payable

to a participant are not subject to divestment -- they are nonforfeitable -- when the participant has satisfied all conditions required of him or her under the provisions of the Plan to establish his or her entitlement to benefits, even though, among other things, he or she does not retire or complete the required waiting period. *Id.* at 373, n. 18.

Finally, Justice Stevens quoted from legislative history to support his conclusion that vested right "means a legal claim obtained to that part of an immediate or deferred life annuity which notwithstanding any conditions subsequent which could affect receipt of any benefit flowing from such right, arises from the participant's covered service under the plan, and is no longer contingent on the

participant remaining covered by the plan." *Id.* at 377, n. 25.

This Court's decision in *Nachman* required the Ninth Circuit to determine whether any conditions precedent existed which prevented petitioner Shane's claim to his pension benefits from vesting before the RTC seized Mercury. Shane had an enforceable claim for pension benefits under the Plan when he turned 65 in May 1987 and he was eligible to retire. Only the condition subsequent of his being terminated for cause (which never arose) could take away petitioner Shane's vested rights under the terms of the Plan.

Here, there were no conditions precedent preventing Shane from asserting his claim to the pension benefits under

the Plan. Thus, under *Nachman*, Shane's pension benefit claims under the Plan were vested before the RTC became Mercury's receiver because Shane's claim to the pension benefits did not depend upon the occurrence of any conditions precedent.

Under *Nachman*, the Ninth Circuit should have focused on Shane's "claim to the benefit" rather than on the "benefit" itself. It is Shane's claim to the benefit rather than the actual retirement payment that must be unconditional and legally enforceable against the Plan. Thus, the fact that Shane may have had to satisfy certain conditions subsequent (i.e., not being terminated for cause) does not make Shane's claim to the pension benefit under the Plan

conditional. Thus, while actual cash payment of the benefit under the Plan may have depended on certain conditions subsequent, Shane's claim to the benefit itself was unconditional.

Moveover, this Court held in *Nachman* that a participant's claim to a pension benefit payment is not subject to divestment -- that is it is vested and nonforfeitable -- as soon as the participant has satisfied all the conditions precedent required of the participant under the provisions of the pension plan to establish entitlement of the benefit. *Nachman*, 446 U.S. at 375. Thus, Shane's claim for pension benefits was vested and nonforfeitable in that only conditions subsequent stood between

Shane and payment of his retirement benefits.

Finally, this Court held in *Nachman* that a participant's vested nonforfeitable rights to pension benefit payments under a pension plan support a legal claim arising from the participant's covered service under the pension plan and are not contingent on the participant remaining covered under the pension plan. Thus, Shane has an enforceable legal claim based on his service at Mercury under the terms of the Plan. This proposition stands regardless of whether conditions subsequent existed which could have had an impact on Shane's actual receipt of his pension benefit cash payments under the Plan. *Nachman*, 446 U.S. at 377, n. 25.

Contrary to this Court's ruling in *Nachman*, the Ninth Circuit erroneously focused on Shane's inability to retire from Mercury before the RTC became Mercury's receiver. According to the Ninth Circuit, Shane's rights to the pension benefit payments under the Plan could not have vested because Shane did not retire. However, this Court held in *Nachman* that a condition subsequent does not preclude Shane's rights to pension benefit payments under the Plan from vesting. Given the Ninth Circuit's conclusory analysis on this issue, which conflicts with this Court's decision in *Nachman*, this Court should grant Shane's petition for writ of certiorari to review the Ninth Circuit's judgment as it pertains to this issue.

II. THE NINTH CIRCUIT'S DECISION IN THIS ACTION CONTRADICTS THE SECOND CIRCUIT'S DECISION IN *HEALY* BECAUSE THE COURT REFUSED TO CONSIDER UNCONTROVERTED PAROL EVIDENCE PURSUANT TO APPLICABLE CONTRACT INTERPRETATION RULES TO EXPLAIN THE MEANING OF THE TERM "VESTED" WHICH THE PLAN DOES NOT DEFINE.

In *Healy v. Rich Products Corp.*, 981 F.2d 68 (2d Cir. 1992), the Second Circuit held that the term "vested" was ambiguous in the context of a non-ERISA "top hat plan." Thus, the *Healy* court held that the district court should not have granted summary judgment using the definition of "vested" found in ERISA. Like the plan in *Healy*, the Plan in this case is a top hat plan. As such, the

Plan was not subject to the vesting requirements in ERISA.

In *Healy*, the trial court relied on ERISA to define "vested" and ruled against the plaintiff. On appeal, the Second Circuit held that the District Court should have applied normal rules of contract interpretation, including parol evidence, to interpret the meaning of "vested" in the Plan rather than relying on ERISA and its definition of "vested" which the court found to be inapplicable. *Healy*, 981 F.2d at 72.

The Ninth Circuit's decision in this action contradicts the holding in *Healy*. Here, the Ninth Circuit refused to apply the normal rules of contractual interpretation including the use of parol

evidence in reaching its holding. Like the Second Circuit in *Healy*, the Ninth Circuit in this action should have permitted petitioner Shane to present facts bearing on the parties' interpretation of the Plan and the parties' respective performances pursuant to the Plan. The Ninth Circuit should have permitted Shane to introduce parol evidence to explain the meaning of "vested" and the meaning of "pay status" rather than reaching a conclusion (without proper supporting analysis) that "vested" meant "pay status" and that Shane could not have been in "pay status" unless he actually was receiving benefits.

In its opinion, the Ninth Circuit states that when "stripped to its

essentials, this case boils down to whether Shane's rights to the disputed benefits have vested prior to the RTC's termination of its contract." Shane respectfully submits that this case actually "boils down" to whether the existence of a material factual dispute about the terms of the Plan precluded the Ninth Circuit from affirming the Central District's grant of summary judgment.

Several points in the Ninth Circuit's opinion support the conclusion that the Ninth Circuit restricted its analysis to the terms of the contract and applied the "plain meaning rule." The Ninth Circuit stated that "in reviewing the contract as a whole, however, it is clear that pay status can only be understood as being paid. (emphasis

added)." The Ninth Circuit's emphasis on the contract's "controlling language" demonstrates that the Ninth Circuit did not properly consider petitioner Shane's parol evidence to ascertain whether it presented reasonable alternative interpretations.

Prior to the California Supreme Court's decision in *Pacific Gas and Electric Co. v. G. W. Thomas Drayage & Rigging Co. Inc.*, 69 Cal. 2d 33, 69 Cal. Rptr. 561, 442 P.2d 641 (1968), the type of "plain meaning" analysis the Ninth Circuit used may have sufficed. However, *Pacific Gas* expressly repudiated the plain meaning rule. In light of the California Supreme Court's decision in *Pacific Gas*, the Ninth Circuit should have addressed parol evidence that Shane

wanted to offer to show the meaning of the Plan's terms.[4]

The *Pacific Gas* decision reflects the California Supreme Court's acknowledgment that a court's pronouncement about what is clear or

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[4] In rejecting the lower court's plain meaning analysis, the *Pacific Gas* decision stated the rule as follows:

> Having determined that the contract had a plain meaning, the [lower] court refused to admit any extrinsic evidence that would contradict its interpretation. When a court interprets a contract on this basis, it determines the meaning of the instrument in accordance with the extrinsic evidence of the judge's own linguistic education and experience. The exclusion of testimony that might contradict the linguistic background of the judge reflects a judicial belief of a possibility of perfect verbal expression. This belief is a remnant of a primitive faith in the inherent potency and inherent meaning of words. The test of admissibility of extrinsic evidence to explain the meaning of a written instrument is not whether it appears to the court to be plain and unambiguous on its face, but whether the offered evidence is relevant to prove a meaning to which the language of the instrument is reasonably susceptible. A rule that would limit the determination of the meaning of a written instrument to its four-dash corners merely because it seems to the court to be clear and unambiguous, would either deny the relevance of the intention of the parties or pre-suppose a degree of verbal precision and stability our language has not attained.

Pacific Gas, 69 Cal. 2d at 36-37.

unclear is not dispositive when the court has reached that conclusion without reference to parol evidence.[5]

In this regard, the Ninth Circuit pronouncement that the terms "vested" and "pay status" as used in the contract were unambiguous is not dispositive because it is clear that the Ninth Circuit reached this conclusion without reference to the

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[5] As the California Supreme Court further articulated in *Pacific Gas*:

> [T]he meaning of a writing can only be found by interpretation in the light of all the circumstances that reveal the sense in which the writer used the words. The exclusion of parol evidence regarding such circumstances merely because the words do not appear ambiguous to the reader can easily lead to the attribution to a written instrument of a meaning that was never intended. Although extrinsic evidence is not admissible to add to, detract from, or vary the terms of a written contract, these terms must first be determined before it can be decided whether or not extrinsic evidence is being offered for a prohibited purpose. The fact that the terms of an instrument appear clear to a judge does not preclude the possibility that the parties chose the language of the instrument to express different terms. That possibility is not limited to contracts whose terms have acquired a particular meaning by trade usage, but exists whenever the parties' understanding of the words used may have differed from the judge's understanding. *Pacific Gas*, 69 Cal. 2d at 38-39.

uncontroverted parol evidence petitioner Shane offered.[6]

The parol evidence petitioner Shane offered demonstrates a material factual dispute as to the meanings of the terms "vested," "pay status" and "accrue." This factual dispute is heightened insofar as petitioner Shane produced evidence, uncontroverted by the RTC, about Shane's, Mercury's and KMPG Peat Marwick's understanding of and application of these terms under the Plan. In light of the above, material

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[6] As the Ninth Circuit articulated in *Barris Industries, Inc. v. Worldvision Enterprises, Inc.*, 875 F.2d 1446 (9th Cir. 1989), "even if a contract appears to be absolutely clear on its face, the court is required to engage in preliminary consideration of extrinsic evidence to see whether it creates an ambiguity." *Barris*, 875 F.2d at 1450. *See also Trident Center v. Connecticut General Life Insurance Company*, 847 F.2d 564 (9th Cir. 1988) (under *Pacific Gas*, it matters not how clearly a contract is written, nor how completely it is integrated, nor how carefully it is negotiated, nor how squarely it addresses the issue before the court: the contract cannot be rendered impervious to parol evidence.); *A. Kemp Fisheries Inc. v. Castle and Cook, Inc.*, 852 F.2d 493 (9th Cir. 1988) (parol evidence rule requires court to consider extrinsic evidence to determine whether any ambiguities exist.)

issues of fact existed which precluded summary judgment.

The Ninth Circuit's terse analysis of the issues in this action does not follow *Pacific Gas*, *Barris*, *Trident* or *A. Kemp*. The Ninth Circuit's opinion restricts the analysis to the contract's "controlling language" and "the contract as a whole." In sum, the Ninth Circuit summary approach does not reflect a preliminary analysis of the parol evidence petitioner Shane offered.

Under California law, the Ninth Circuit, in conducting its *de novo* review, had to engage in a two-step analysis.[7]

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[7] As explained in *General Motors Corp. v. Superior Court*, 12 Cal. App. 4th 435, 15 Cal. Rptr. 2d 622 (Cal. Ct. App. 1993):

The Ninth Circuit's failure to conduct the two-step analysis on Shane's parol evidence evidences a flaw in the Ninth Circuit's reasoning.

In light of the above, the Ninth Circuit's refusal to consider parol evidence and its linking "vested" to actual receipt of pension benefits fly in the face of this Court's decision in *Nachman* and the lower court's decisions discussed *infra*. As the Second Circuit held in *Healy*:

The determination whether to admit parol evidence involves a two-step process. First, the court provisionally receives (without actually admitting) all credible evidence concerning the parties' intentions to determine ambiguity, i.e., whether the language is reasonably susceptible to the interpretation used by a party. If in light of the extrinsic evidence the court decides the language is reasonably susceptible to the interpretation suggested, the extrinsic evidence is then admitted to aid the second step -- interpreting the contract." *General Motors*, 12 Cal. App. 4th at 441.

We find no support for Judge Elfvin's conclusion that vested as used here is defined by ERISA. Because the parties ascribed different meanings to the term vested and there is no clear indication in ERISA how the term should be defined with respect to these plans [i.e. top hat plans such as the plan in this action] the district court must interpret the language of the release exception without reference to the ERISA statute. The meaning of vested, as it is used in the general release, must be ascertained under the customary principles of contract interpretation.

Healy, 981 F.2d at 72.

In this action, the RTC and Shane certainly attributed different meanings to the term "vested". Like the Second Circuit in *Healy*, the Ninth Circuit should have remanded the case to the Central District for a determination using normal rules of contract interpretation and parol evidence if necessary to ascertain the meaning of the term "vested."

III. THE NINTH CIRCUIT'S DECISION IN THIS ACTION CONTRADICTS THE SIXTH CIRCUIT'S DECISION IN *QUINN* BECAUSE MATERIAL FACTUAL ISSUES EXIST ABOUT WHETHER SHANE WAS ENTITLED TO RECEIVE HIS PENSION BENEFITS WHEN THE RTC RETAINED SHANE AS AN EMPLOYEE AFTER IT BECAME MERCURY'S RECEIVER.

In *Federal Savings & Loan Ins. Corp. v. Quinn*, 922 F.2d 1251 (6th Cir. 1991), the Sixth Circuit reasoned that when a banking regulator retains, post-receivership, the former officers and/or employees of the defunct institution, and enters into a compensation contract with those officers and/or employees for post-receivership duties performed by the officers and directors on behalf of the

banking regulator, the regulator cannot subsequently repudiate those contracts.[8]

After the RTC seized Mercury, the RTC, through its managing agent, requested Shane, and he agreed, to remain at Mercury, at full pay, and to assist the RTC in winding up Mercury's affairs. When it did so, the RTC made a determination that Shane's continued employment apparently was necessary for the continued operation of Mercury.

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[8] The *Quinn* court held that:

> Although FSLIC, pursuant to Section 563.39(5)(ii), apparently determined that [the institution] was in an unsafe or unsound condition, which would ordinarily terminate [the institution's] obligations under its employment contracts with [the officers], FSLIC triggered the exception through actions that amount to a determination of the continuation of those employment contracts until their negotiated expiration date was necessary to improve [the institution's] unsafe or unsound condition. Therefore, because [the officers] were fired during the life of their employment contracts, which FSLIC knowingly entered into with the hope of rescuing [the institution] from insolvency, we vacate the district court's order entering the preliminary injunction.

Quinn, 922 F.2d at 1253.

Therefore, under this additional exception of §563.39(b)(5), the RTC's obligations to petitioner Shane under his pension plan also continued. The RTC disagrees that it made any such determination or that it continued Shane's employment with Mercury. In light of *Quinn* and given disputed material facts as to whether the RTC did or did not retain Shane after the receivership to assist the RTC in its management of Mercury, the Ninth Circuit erroneously affirmed the Central District's summary judgment.

IV. **ASSUMING THAT 12 C.F.R. §563.39 REGULATING THRIFT ASSOCIATION EMPLOYMENT CONTRACTS APPLIES TO THE PLAN, SHANE STILL IS ENTITLED TO RECEIVE HIS PENSION BENEFIT PAYMENTS BECAUSE HIS RIGHTS TO THESE BENEFITS VESTED PRIOR TO THE RTC BECOMING MERCURY'S RECEIVER.**

It is questionable whether §563.39 even applies to petitioner Shane's claims for retirement pension benefits from the Plan. Under §563.39, Mercury could enter into an employment contract with petitioner Shane and other officers and employees so long as such contracts did not constitute an unsafe and unsound practice. 12 C.F.R. §563.39(a). This regulation provides that "all obligations under the contract shall be terminated"

when the association is found to be in an unsafe or unsound condition, except that "any rights of the parties that have already vested, however, shall not be affected by such action." 12 C.F.R. §563.39(b)(5). This regulation does not mention pension plans.

As interpreted by the courts, an employment contract regulated under §563.39 must contain provisions on the terms of the participant's employment or terms for the participant's continued employment until some event occurs in the future. *See Fresca v. Federal Deposit Insurance Corp.*, 818 F. Supp. 664, 666. (S.D. N.Y. 1993). *See also Marsa v. MetroBank Savings*, 825 F. Supp. 658 (D. N.J. 1993). To constitute an employment contract subject to regulation under

§563.39, the agreement must set forth the conditions and terms of participant's employment) (*citing Rice v. Resolution Trust Corp.*, 785 F. Supp. 1385, 1390 (D. Ariz. 1992)).[9]

In *Fresca*, *supra*, the court held that the benefits plan at issue did not constitute an employment agreement subject to §563.39 and thus did not terminate automatically by operation of law pursuant to that regulation. More importantly, the court held that even if the benefits plan constituted an employment contract, the RTC still had to compensate the participant because the participant's rights had vested. The

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[9] Counsel for petitioner also are counsel for Mr. Gene E. Rice in his appeal before the Ninth Circuit Court of Appeals, Case No. 92-15865, of the U.S. District Court of Arizona's decision in *Rice v. RTC*, 785 F. Supp. 1385 (D. Ariz. 1992). Counsel argued Mr. Rice's appeal on August 10, 1993. As of November 26, 1993, this appeal still is under submission.

participant's rights had vested because "there is no condition precedent which has not been fulfilled by plaintiff." *Fresca*, 818 F. Supp. at 667.

Similarly, in the action before this Court, Shane has fulfilled all conditions precedent. The only condition subsequent between Shane and his retirement pension benefits was not being terminated for cause. As such, Shane's rights vested prior to the RTC placing Mercury into receivership.

Moreover, under 12 U.S.C. §1821(e), the court in *Fresca* found it doubtful that the regulators could repudiate the contract at issue in that action if the participant's rights already had vested. In this regard, the *Fresca* court

distinguished *Rice*, *supra*, and *Rush v. Federal Deposit Insurance Corp.*, 747 F. Supp. 575 (N.D. Cal. 1990) in that both *Rush* and *Rice* involved severance agreements under which the participant's rights had not yet vested.[10]

Finally, in *Fresca* the court did not reach the broader question of whether the FDIC can repudiate an executory contract when the other party's rights already have vested subject only to conditions subsequent. Nevertheless, the court held that the plaintiff still would be entitled to actual compensatory damages

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[10] The court in *Fresca* held that:

> Therefore, while it is certainly clear that employee benefit programs are not immune to the broad repudiation powers of the FDIC, it is far from apparent that the FDIC could repudiate a contract once those employee benefit rights have vested.

Fresca, 818 F. Supp. at 668.

resulting from the FDIC's repudiation of her contract. In this regard, the *Fresca* court distinguished *Howell v. Federal Deposit Ins. Corp.*, 986 F.2d 569 (1st Cir. 1993) on the ground that the severance payments at issue were not actual direct compensatory damages within the ambit of 12 U.S.C. §1821(e), but rather were liquidated damages to compensate for lost opportunities -- a category of damages expressly disallowed by FIRREA. *Fresca*, 818 F. Supp. at 670.

Thus, under *Fresca*, the Ninth Circuit should have found that Shane's rights already had vested because no conditions precedent stood between Shane and his retirement pension benefits. Moreover, under *Fresca*, the Ninth Circuit should have allowed Shane to recover his

pension benefits because such benefits were properly recoverable compensatory damages.

In *Marsa, supra*, the court, like the court in *Fresca*, questioned whether 12 C.F.R. §563.39 actually applies to pension plans.[11]

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[11] That the settlement agreement constitutes an employment contract is far from clear. The term employment contract is not defined in either the regulation or in the statute itself. Courts that have addressed the issue have relied on the definition contained in Black's Law Dictionary, which defines employment contract as an agreement or contract between employer and employee in which the terms and conditions of one's employment are provided. Black's Law Dictionary (6th Ed. 1990); *See Rice v. Resolution Trust Corporation*, 785 F. Supp. 1385, 1390 (D. Ariz. 1992); *Fresca v. Federal Deposit Ins. Corp.*, 1993 W.L. 122 677 at *3 (S.D. N.Y. April 16, 1993). In *Rice*, the court held that a salary continuation agreement constituted an employment contract within the meaning of 12 C.F.R. Section 563.39(b)(5) because the agreement set forth the general terms and conditions of the plaintiff's employment and because it was the only agreement that governed the plaintiff's employment while he was at the bank. 785 F. Supp. 1389-90. In contrast, in *Fresca*, the court suggested that an early retirement package did not constitute an employment contract because the agreement did not set out the terms of the plaintiff's employment and did not envision the plaintiff's continued employment. *Marsa*, 825 F. Supp. at 662.

The *Marsa* court also held that even if the agreement at issue in that action constituted an employment contract within the ambit of 12 C.F.R. §563.39, the party's contractual rights to payment nevertheless still would have "vested" at the time the RTC was appointed receiver and therefore could not be impaired by any purported disaffirmance. "Rights under an agreement will be deemed vested if they are not subject to a condition precedent or, stated differently are unconditional. *See e.g. Wilde v. First Federal Savings and Loan Association of Wilmette*, 480 N.E.2d 1236 (Ill. App. Ct. 1985); *Federal Savings and Loan Ins. Corp. v. Quinn*, 711 F. Supp. 366 (N.D. Ohio 1989), vacated on other grounds 922 F.2d 1251 (6th Cir. 1991)." *Id.*

The *Marsa* court concluded that in contrast to the parties in *Wilde*, *Quinn* and *Rice*, Marsa's rights to payment under the settlement agreement vested "at the time he executed the agreement and resigned from MetroBank, over one year prior to the bank's takeover by the RTC and the RTC's disaffirmance of the settlement agreement. There was no condition precedent to receipt of the benefits under the settlement agreement [citations omitted]." *Marsa*, 825 F. Supp. at 663.

Like the court in *Fresca*, the court in *Marsa* ruled that while 12 U.S.C. §1821(e) "expressly permits a receiver to repudiate a contract, such repudiation is not without its consequences. The receiver is still liable for damages

caused by the repudiation. [citations omitted] Thus, a plaintiff may recover damages for accrued or existing obligations as of the date of the appointment. In contrast, a receiver is not liable for future or contingent obligations." *Marsa*, 825 F. Supp. at 665.

In the case before this Court, Shane's rights to his retirement pension benefits accrued by the time the RTC took over Mercury as receiver. Mercury's contractual obligation to pay retirement pension benefits to Shane was not a future or contingent obligation. Rather, Shane's rights to his pension benefits vested once he turned sixty-five (65) without having been terminated for cause. Thus the only possible event standing

between Shane and his pension benefits was a condition subsequent -- not being terminated for cause -- which never occurred.

Under *Marsa*, Shane's rights to his claim for retirement pension benefits already had vested when the RTC took over as receiver. Thus, assuming §563.39 actually applies, the RTC still must honor Mercury's contractual obligations under the Plan. However, assuming that the RTC could have repudiated the contract pursuant to 12 U.S.C. § 1821(e), Shane still is entitled to recover his actual compensatory damages (i.e. his retirement pension benefits) stemming from the RTC's repudiation or anticipatory breach of its obligations under the Plan.

In *LaMagna v. Federal Deposit Ins. Corp.*, 828 F. Supp 1 (D. D.C. 1993), Judge Sporkin ruled that 12 U.S.C. §1821(e) did not permit the RTC to repudiate the plaintiff's employment severance agreement without compensating the plaintiff because the severance agreement constituted actual direct compensatory damages. In reaching this holding, Judge Sporkin first determined that plaintiff's entitlement to severance payments arose from a nonexecutory rather than an executory contract and that the FDIC could not repudiate a nonexecutory contract.

The court in *LaMagna* found that the contract was a nonexecutory contract because the plaintiff had performed all his contractual obligations under the

contract. *LaMagna*, 828 F. Supp. at 2-3. Of equal significance, the *LaMagna* court held that the plaintiff's rights to the severance payment "vested ~~the~~ day he and [the institution] reached their agreement." *Id.* at 3. Thus, Judge Sporkin rejected the FDIC's argument that LaMagna's rights did not vest until his termination which occurred <u>after</u> the FDIC took over the institution as receiver. The court, therefore, concluded that the FDIC was obligated to honor the severance payment provision in the employment agreement.

Under *LaMagna*, Shane's rights vested either when he entered into the Plan or at the latest when he turned sixty-five (65) which took place long before the RTC took over as receiver for Mercury. In

light of the above, the Ninth Circuit's focus on actual payment of benefits was erroneous and does not support the Central District's summary judgment.

V. THE NINTH CIRCUIT'S DECISION IN THIS ACTION CONFLICTS WITH THIS COURT'S *HCSC-LAUNDRY V. UNITED STATES* LINE OF CASES BECAUSE THE NINTH CIRCUIT FAILED TO INTERPRET AND APPLY THE SPECIFIC STATUTE -- 12 C.F.R. §563.47 -- WHICH APPLIES TO THE PLAN AND SHANE'S RIGHTS THEREUNDER.

Since at least 1959, the federal regulatory scheme for savings and loan associations has prescribed the circumstances under which an association could adopt employment contracts and retirement plans for their employees.

The regulations provide, among other things, the parameters of such contracts and plans and the requirements for adopting and terminating them.

At the time of the RTC takeover of Mercury, employment contracts were governed by §563.39 and retirement plans by §563.47.

Section 563.39 expressly applies to "employment contracts" but does not define that term. It permits associations to enter into employment contracts with its officers and other employees so long as such contracts do not constitute an unsafe and unsound practice. 12 C.F.R. §563.39(a). It requires that "all obligations under the contract shall be terminated" when the

association is found to be in an unsafe or unsound condition, except that "any rights of the parties that have already vested, however, shall not be affected by such action." 12 C.F.R. §563.39(b)(5).

Section 563.47 expressly applies to "pension plans" as defined by §3(2) of the Employee Retirement Income Security Act 1974 ("ERISA").

Both §563.39 and §563.47 proscribe unsafe or unsound contracts and plans. However, §563.47 does not provide for automatic termination of the plan when the association is found to be in an unsafe and unsound condition. Rather, it permits "the sponsor's board of directors and its successors to terminate such

plan" upon 60 days notice. 12 C.F.R. §563.47(d) (emphasis added).

Shane's Plan certainly falls squarely within the definition of "pension plan" in the Pension Plan Regulation. Indeed, the record is clear and uncontroverted that the Plan was designed to provide retirement benefits to Shane in exchange for lengthy years of service to the institution. Under the Plan, Shane's retirement benefit is based upon his age and length of service at the time of retirement. The retirement benefit is payable under all circumstances of Shane's leaving employment except termination for cause. Shane's benefit could not be terminated unilaterally by Mercury and was expressly binding on the successors of Mercury.

Given the fact that "employment contract" is not defined, §563.39 is ambiguous. The regulation does not indicate, by its own terms, that it applies to pension plans at all. On the other hand, the term "pension plan" is expressly defined in §563.47. Because the two regulations each separately proscribe certain contract terms and contained different termination provisions, it is evidence that the regulatory scheme was designed to treat employment contracts and pension plans separately, by separate regulations. The fact that §563.39 does not even mention retirement, deferred compensation or pension plans indicates that it was not intended to encompass them. Accordingly, if Shane's Plan is within the specific definition of "pension plan" and is

thereby governed by §563.47, then it is not governed by §563.39 whose scope is not defined. "It is a basic rule of statutory construction that a specific statute controls over a general statute." *HCSC-Laundry v. United States*, 450 U.S. 1, 101 S. Ct. 836, 838-39, 67 L. Ed. 2d 1 (1981); *see also, Union Central Life Insurance Company v. Wernick*, 777 F.2d 499 (9th Cir. 1985).

A statute or regulation should be strictly construed when, as in this case, a broad, expansive construction would deprive a long-term employee of his retirement benefits and would render it exceedingly difficult for financial institutions to attract and retain able management. *See Crandon v. United States*, 494 U.S. 152, 168, 110 S. Ct.

997, 1006-7, 108 L. Ed. 2d 132 (1990) (where a statute prohibiting compensation to government employees by private entities did not expressly preclude severance payments to employees before they entered government service and the allowance of such payments promoted the legislative intent to encourage qualified individuals to work for the government, the Court held that such payments were not prohibited by the statute).

The regulatory purpose behind §563.39 was to give regulators necessary flexibility in dealing with abuses associated with long-term employment contracts, such as depletion of an institution's assets and difficulty in arranging mergers. Shane's Plan does not present such a danger. To avoid a

sudden, unexpected drain on its assets, Mercury provided a source of cash to pay the benefits which were expected to become payable under the Plan by purchasing whole life insurance policies on Shane's life and by annually reflecting the present value of the anticipated benefit as an expense on its books.

In light of the ambiguities surrounding whether §563.39 or §563.47 applies to the Plan, the Ninth Circuit should not have affirmed the Central District's summary judgment. The conclusory analysis by the Ninth Circuit (which affirms an order devoid of any analysis) was erroneous and does not support the Ninth Circuit's decision that

no material issues of fact existed in this action.

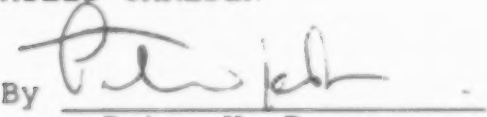
CONCLUSION

Material fact issues, uncertain laws and an ambiguous pension plan should have precluded summary judgment in this action. In light of the above, petitioner Shane respectfully requests that this Court issue a writ of certiorari reviewing the Ninth Circuit's judgment and decision.

DATED: November 26, 1993

Respectfully submitted,

ROSEN & WINSTON
PETER K. ROSEN
JERI L. DYE
MILES CARLSEN

By 
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LEONARD SHANE

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SHANE v. RESOLUTION TRUST CORPORATION
APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED: June 30, 1993

LEONARD SHANE,

Plaintiff-Appellant,

v. No. 91-56373

RESOLUTION TRUST CORP., MERCURY SAVINGS AND LOAN D.C. No. CV 90-0250 GLT

Defendant-Appellee.

MEMORANDUM*

Appeal from the
United States District Court
for the Central District of California
Gary L. Taylor, District Judge, Presiding

Argued and Submitted April 6, 1993
Pasadena, California

Before: HALL, WIGGINS, AND TROTT,

Circuit Judges.

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

Appellant Leonard Shane ("Shane") appeals the district court's grant of summary judgment to the Resolution Trust Corporation ("RTC). Appellant contends he is entitled to retirement benefits of $880,000 due to him under a "top-hat" retirement plan ("Plan") designed for a select group of former employees of Mercury Savings and Loan Association ("Mercury"). The district court granted the RTC's motion for summary judgment. Shane now appeals.

The district court had jurisdiction pursuant to 28 U.S.C. § 1331 (1988). We have jurisdiction over this timely appeal pursuant to 28 U.S.C. § 1291 (1988). We affirm.

I

STANDARD OF REVIEW

A grant of summary judgment is reviewed de novo. T.W. Electrical Service, Inc. v. Pacific Electrical Contractors Association, 809 F.2d 626, 629 (9th Cir. 1987). Viewing the evidence in the light most favorable to the non-moving party, we must determine whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law. Tzung v. State Farm Fire and Casualty Co., 873 F.2d 1338, 1339-40 (9th Cir. 1989).

II

DISCUSSION

Stripped to its essentials, this case boils down to whether Shane's rights

to the disputed benefits had vested prior to the RTC's termination of his contract. Under the controlling language of the Plan, it is clear they did not. The Plan provides that a benefit will vest when it is in "pay status." Thus, whether Shane's benefits had vested under the terms of the Plan depends upon the meaning of "pay status."

Shane argues that the meaning of "pay status" is ambiguous. In reviewing the contract as a whole, however, it is clear that "pay status" can only be understood as "being paid." Under the terms of the Plan, for Shane's benefits to have vested, he would have had to retire. Section 3 of the Plan entitled "Eligibility to Participate" provides:

Each Executive who is a participant in the Basic Plan, and who either:

(a) reaches Normal Retirement Age while employed by the Association and retires on or after such date; or (b) has voluntarily retired from the Association after reaching age 55 and completing at least 15 Years of Service but prior to reaching Normal Retirement Age, shall become a Participant in this Plan upon such retirement. Notwithstanding the foregoing, no benefit shall be paid to an Executive who is terminated by the Association for good cause.

(emphasis added). Moreover, section 5(b) provides that benefits will commence "on the first month following the

Participant's retirement." Thus, the Plan requires that the executive retire to receive payment.

Because Shane had not retired at the time the RTC took over Mercury, his benefits had not vested under the terms of the contract. Therefore, the RTC had authority under 12 C.F.R. § 563.39 to deny Shane his benefits.

Shane also contends that even if his rights were not vested at the time Mercury was seized, a material factual issue exists as to his employment status after seizure. After carefully reviewing Shane's arguments as well as the record on appeal, we have concluded that those arguments are without merit.
Accordingly, the decision of the district court granting RTC's motion for summary judgment is AFFIRMED.

SHANE v. RESOLUTION TRUST CORPORATION
APPENDIX B

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

FILED SEPTEMER 23, 1991
ENTERED SEPTEMBER 24, 1991

LEONARD SHANE,
an individual,

Plaintiff,

vs.

RESOLUTION TRUST CORPORATION
as Receiver of Mercury Savings
and Loan Association,

Defendant.

SACV 90-250 GLT

SUMMARY JUDGMENT

Date: July 29, 1991
Time: 10:00 a.m.
Ctrm: Hon. G.L. Taylor

THE MOTION FOR SUMMARY JUDGMENT pursuant to Federal Rule of Civil Procedure 56 of defendant the Resolution Trust Corporation as Receiver of Mercury Savings and Loan Association ("Receiver") came on regularly for hearing on July 29, 1991 at 10:00 a.m. The parties submitted papers in support of, and opposition to, the motion. The Court has considered the

papers filed by, and the arguments of, all parties, and has found that there is no genuine issue as to any material fact. Now, therefore,

IT IS ORDERED, ADJUDGED AND DECREED that defendant the Resolution Trust Corporation as Receiver of Mercury Savings and Loan Association shall have summary judgment pursuant to Federal Rule of Civil Procedure 56 against plaintiff LEONARD SHANE on both counts of plaintiff's complain., and that plaintiff shall take nothing by his complaint in this case.

IT IS FURTHER ORDERED that defendant the Resolution Trust Corporation as Receiver of Mercury Savings and Loan

Association shall recover its costs in this case.

Dated: September 20, 1991

/s/ G. L. Taylor
JUDGE OF THE UNITED STATES
DISTRICT COURT

Presented By:

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SHANE v. RESOLUTION TRUST CORPORATION
APPENDIX C

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED: August 30, 1993

LEONARD SHANE, Plaintiff-Appellant, v. RESOLUTION TRUST CORPORATION, as Conservator for Mercury Savings and Loan Assoc.; MERCURY SAVINGS & LOAN, Defendants-Appellees.	No. 91-56373 D.C. No. CV-90-0250-GLT ORDER

Before: Judges HALL, WIGGINS, and TROTT, Circuit Judges.

The petition for rehearing is denied.

SHANE v. RESOLUTION TRUST CORPORATION
APPENDIX D

12 CFR Ch. V (1-1-92 Edition) Office of the Thrift Supervision

§ 563. 39 Employment contracts.

(a) *General.* A savings association may enter into an employment contract with its officers and other employees only in accordance with the requirements of this section. All employment contracts shall be in writing and shall be approved specifically by an association's board of directors. An association shall not enter into an employment contract with any of its officers or other employees if such contract would constitute an unsafe or unsound practice. The making of such an employment contract would be an unsafe or unsound practice if such contract could lead to material financial loss or damage to the association or could interfere

materially with the exercise by the member of its board of directors of their duty or discretion provided by law, charter, bylaw or regulation as to the employment or termination of employment or termination of employment or an officer or employee of the association. This may occur, depending upon the circumstances of the case, where an employment contract provides for an excessive term.

(b) *Required provisions.* Each employment contract shall provide that:

(1) The association's board of directors may terminate the officer of employee's employment at any time, but any termination by the association's board of directors other than termination

for cause, shall not prejudice the officer or employee's right to compensation or other benefits under the contract. The officer or employee shall have no right to receive compensation or other benefits for any period after termination for cause. Termination for cause shall include termination because of the officer or employee's personal dishonesty, incompetence, willful misconduct, breach of fiduciary duty involving personal profit, intentional failure to perform stated duties, willful violation of any law, rule, or regulation (other than traffic violations or similar offenses) or final cease-and-desist order, or material breach of any provision of the contract.

(2) If the officer or employee is suspended and/or temporarily prohibited from participating in the conduct of the association's affairs by a notice served under section 8(e)(3) or (g)(1) of Federal Deposit Insurance Act (12 U.S.C. 1818 (e)(3) and (g)(1) the association's obligations under the contract shall be suspended as of the date of service unless stayed by appropriate proceedings. If the charges in the notice are dismissed, the association may in its discretion (i) pay the officer or employee all or part of the compensation withheld while its contract obligations were suspended, and (ii) reinstate (in whole or in part) any of its obligations which were suspended.

(3) If the officer or employee is removed and/or permanently prohibited from participating in the conduct of the association's affairs by an order issued under section 8(e)(4) or (g)(1) of the Federal Deposit Insurance Act (12 U.S.C. 1818 (e)(4) or (g)(1)), all obligations of the association under the contract shall terminate as of the effective date of the order, but vested rights of the contracting parties shall not be affected.

(4) If the savings association is in default (as defined in section 3(x)(1) of the Federal Deposit Insurance Act), all obligations under the contract shall terminate as of the date of default, but this paragraph (b)(4) shall not affect any vested rights of the contracting

parties: *Provided*, that this paragraph (b)(4) need not be included in an employment contract if prior written approval is secured from the Director or his or her designee.

(5) All obligations under the contract shall be terminated, except to the extent determinated that continuation of the contract is necessary of the continued operation of the association.

(i) by the Director or his or her designee, at the time the Federal Deposit Insurance Corporation or Resolution Trust Corporation enters into an agreement to provide assistance to or on behalf of the association under the authority contained in 13(c) of the Federal Deposit Insurance Act; or

(ii) by the Director or his or her designee, at the time the Director or his or her designee approves a supervisory merger to resolve problems related to operation of the association or when the association is determined by the Director to be in an unsafe or unsound condition.

Any rights of the parties that have already vested, however, shall not be affected by such action.

SHANE v. RESOLUTION TRUST CORPORATION
APPENDIX E

§ 563.47 Pension Plans.

(a) *General.* No savings association or service corporation thereof shall sponsor an employee pension plan which, because of unreasonable costs or any other reason, could lead to material financial loss or damage to the sponsor. For purposes of this section, an employee pension plan is defined in section 3(2) of the Employee Retirement Income Security Act of 1974, as amended. The prospective obligation or liability of a plan sponsor to each plan participant shall be stated in or determinable from the plan, and, for a defined benefit plan, shall also be based upon an

actuarial estimate of future experience under the plan.

(b) *Funding.* Actuarial cost methods permitted under the Employee Retirement Income Security Act of 1974 and the Internal Revenue Code of 1954, as amended, shall be used to determine plan funding.

(c) *Plan amendment. A plan may be amended to provide reasonable annual cost-of-living increases to retired* participants: *Provided,* That

(1) Any such increase shall be for a period and amount determined by the sponsor's board of directors, but in no event shall it exceed the annual increase

in the Consumer Price Index published by the Bureau of Labor Statistics; and

(2) No increase shall be granted unless (i) anticipated charges to net income for future periods have first been found by such board of directors to be reasonable and are documented by appropriate resolution and supporting analysis; and (ii) the increase will not reduce the association's regulatory capital below its regulatory capital requirement.

(d) *Termination.* The plan shall permit the sponsor's board of directors and its successors to terminate such plan. Notice of intent to terminate shall be filed with the District Director

at least 60 days prior to the proposed termination date.

(e) *Records.* Each savings association or service corporation maintaining a plan not subject to record keeping and reporting requirements of the Employee Retirement Income Security Act of 1974, and the Internal Revenue Code of 1954, as amended, shall establish and maintain records containing the following:

(1) Plan description;

(2) Schedule of participants and beneficiaries;

(3) Schedule of participants and beneficiaries' rights and obligations;

(4) Plan's financial statements; and

(5) Except for defined contribution plans, an opinion signed by the Employee Retirement Income Security Act of 1974) affirming that actuarial assumptions in the aggregate are reasonable, take into account the plan's experience and expectations, and represent the actuary's best estimate of the plan's projected experiences.

SHANE v. RESOLUTION TRUST CORPORATION
APPENDIX F

FEDERAL DEPOSIT INSURANCE CORPORATION
12 USCS §1821.

§1821. Permanent Insurance Fund

(a) Deposit insurance.

(1) Insured amounts payable.

(A) In general. The Corporation shall insure the deposits of all insured depository institutions as provided in this Act.

(B) Net amount of insured deposit. The net amount due to any depositor at an insured depository institution shall not exceed $100,000 as determined in accordance with subparagraphs (C) and (D).

(C) Aggregation of deposits. For the purpose of determining the net amount due to any depositor under subparagraph (B), the Corporation shall aggregate the amounts of all deposits in the insured depository institution which are maintained by a depositor in the same capacity and the same right for the benefit of the depositor either in the name of the depositor or in the name of any other person, other than any amount in a trust fund described in section 7(i)(1) [12 USCS § 1817(i)(1)].

(D) Coverage on pro rata or "pass-through" basis.

(i) In general. Except as provided in clause (ii), for the purpose of determining the amount of insurance

due under subparagraph (B), the Corporation shall provide deposit insurance coverage with respect to deposits accepted by any insured depository institution on a pro rata or "pass-through" basis to a participant in or beneficiary of an employee benefit plan (as defined in section 11(a)(8)(B)(ii) [subsec.(a)(8)(B)(ii) of this section]), including any eligible deferred compensation plan described in section 457 of the Internal Revenue Code of 1986 [26 USCS § 457].

(ii) Exception. After the end of the 1-year period beginning on the date of the enactment of the Federal Deposit Insurance Corporation

Improvement Act of 1991 [enacted Dec. 19, 1991], the Corporation shall not provide insurance coverage on a pro rata or "pass-through" basis pursuant to clause (i) with respect to deposits accepted by any insured depository institution which, at the time such deposits are accepted, may not accept brokered deposits under section 29 [12 USCS § 1831f].

(iii) Coverage under certain circumstances. Clause (ii) shall not apply with respect to any deposit accepted by an insured depositor institution described in such clause if, at the time the deposit is accepted -

(I) the institution meets each applicable capital standard; and

(II) the depositor receives a written statement from the institution that such deposits at such institution are eligible for insurance coverage on a pro rata or "pass-through" basis.

(2) (A) Notwithstanding any limitation in this Act or in any other provision of law relating to the amount of deposit insurance available for the account of any one depositor, in the case of a depositor who is --

(i) an officer, employee, or agent of the United States having official custody of public funds and lawfully

investing or depositing the same in time and savings deposits in an insured depository institution;

(ii) an officer, employee, or agent of any State of the United States, or of any country, municipality, or political subdivision thereof having official custody of public funds and lawfully investing or depositing the same in time and savings deposits in an insured depository institution in such State;

(iii) an officer, employee, or agent of the District of Columbia having official custody of public funds and lawfully investing or depositing the same in time and savings deposits in

an insured depository institution in the District of Columbia;

(iv) an officer, employee, or agent of the Commonwealth of Puerto Rico, of the Virgin Islands, of American Samoa, of the Trust Territory of the Pacific Islands, or of Guam, or of any county, municipality, or political subdivision thereof having official custody of public funds and lawfully investing or depositing the same in time and savings deposits in an insured depository institution in the Commonwealth of Puerto Rico, the Virgin Islands, American Samoa, the Trust Territory of the Pacific Islands, or Guam, respectively; or

(v) an officer, employee, or agent of any Indian tribe (as defined in section 3(c) of the Indian Financing Act of 1974 [25 USCS § 1452(c)]) or agency thereof having official custody of tribal funds and lawfully investing or depositing the same in time and savings deposits in an insured depository institution; such depositor shall, for the purpose of determining the amount of insured deposits under this subsection, be deemed a depositor in such custodial capacity separate and distinct from any other officer, employee, or agent of the United States or any public unit referred to in clause (ii), (iii), (iv), or (v) and the deposit of any such depositor shall be insured in an

amount not to exceed $100,000 per account [in an amount not to exceed $100,000 per account].

(B) The Corporation may limit the aggregate amount of funds that may be invested or deposited in deposits in any insured depository institution by any depositor referred to in subparagraph (A) of this paragraph on the basis of the size of any such bank in terms of it assets: Provided, however, such limitation may be exceeded by the pledging of acceptable securities to the depositor referred to in subparagraph (A) of this paragraph when and where required.

(3) Notwithstanding any limitation in this Act or in any other provision of law

relating to the amount of deposit insurance available for the account of any one depositor, time and savings deposits in an insured depository institution made pursuant to a pension or profit-sharing plan described in section 401(d) of the Internal Revenue Code of 1954, as amended [26 USCS §401(d)], or made in the form of individual retirement accounts as described in section 408(a) of the Internal Revenue Code of 1954 as amended [26 USCS §408(a)], shall be insured in the amount of $100,000 per account. As for any plan qualifying under section 401(d) or section 408(a) of the Internal Revenue Code of 1954 [26 USCS §401(d) or §408(a)], the term "per account" means the present vested and ascertainable interest of each beneficiary under the plan, excluding any

remainder interest created by, or as a result of, the plan.

(4) General provision relating to funds. The Bank Insurance Fund established under paragraph (5) and the Savings Association Insurance Fund established under paragraph (6) shall each be -

(A) maintained and administered by the Corporation;

(B) maintained separately and not commingled; and

(C) used by the Corporation to carry out its insurance purposes in the manner provided in this subsection.

(5) Bank Insurance Fund.

(A) Establishment. There is established a fund to be known as the Bank Insurance Fund.

(B) Transfer to fund. On the date of the enactment of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 [enacted Aug. 9, 1989], the Permanent Insurance Fund shall be dissolved and all assets and liabilities of the Permanent Insurance Fund shall be transferred to the Bank Insurance Fund.

(C) Uses. The Bank Insurance Fund shall be available to the Corporation for use with respect to the Bank Insurance Fund members.

(D) Deposits. All amount assessed against Bank Insurance Fund members by the Corporation shall be deposited into the Bank Insurance Fund.

(6) Savings Association Insurance Fund.

(A) Establishment. There is established a fund to be known as the Savings Association Insurance Fund.

(B) Uses. The Savings Association Insurance Fund shall be available to the Corporation for use with respect to Savings Association Insurance Fund members.

(C) Deposits. All amounts assessed against Savings Association

Insurance Fund members which are not required for the Financing Corporation, the Resolution Funding Corporation, or the FSLIC Resolution Fund shall be deposited in the Savings Association Insurance Fund.

(D) Availability of funds for administrative expenses.

(i) In general. The FSLIC Resolution Fund shall deposit in the Savings Association Insurance Fund such amounts as the Corporation determines are needed during the period beginning on the date of the enactment of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 [enacted Aug. 9, 1989] and ending on

September 30, 1991, to pay the administrative and supervisory expenses of such Fund.

(ii) Priority. The Savings Association Insurance Fund shall have priority over other obligations of the FSLIC Resolution Fund with respect to such amounts.

(E) Treasury payments to Fund. To provide sufficient funding for the Savings Association Insurance Fund to carry out the purposes of this Act, the Secretary of the Treasury shall pay to such Fund, for each of the fiscal years 1993 through 2000, the amount, if any, by which $2,000,000,000 exceeds the amount deposited in such Fund (during such

fiscal year) pursuant to subparagraph (C).

(F) Treasury payments to maintain net worth of Fund. The Secretary of the Treasury shall pay to the Savings Association Insurance Fund, for each fiscal year described in the following table, any additional amount which may be necessary, as determined by the Corporation and the secretary of the treasury to ensure that such Fund has the minimum net worth referred to in such table throughout each such fiscal year:

For the fiscal year beginning October 1 of:	The amount of minimum net worth (in billions):
1991	0.0
1992	1.0
1993	2.1
1994	3.2
1995	4.3
1996	5.4
1997	6.5
1998	7.6
1999	8.8

(G) Exception to subparagraphs (E) and (F). Notwithstanding subparagraphs (E) and (F), no payment may be made pursuant to such subparagraphs after the Savings Association Insurance Fund achieves a reserve ratio of 1.25 percent.

(H) Discretionary RTC payments. If amounts available to the Savings Association Insurance Fund for purposes

other than the payment of administrative expenses are insufficient for the Savings Association Insurance Fund to carry out the purposes of this Act, the Corporation may request the Resolution Trust Corporation to provide, and the Oversight Board of the Resolution Trust Corportion [Thrift Depositor Protection Oversight Board] (in the discretion of the Oversight Board [Thrift Depositor Protection Oversight Board]) may pay, such amount as may be needed for such purposes.

(I) Borrowing authority.

(i) In general. The Corporation may borrow from the Federal home loan banks, with the concurrence of the Federal Housing Finance Board, such

funds as the Corporation considers necessary for the use of the Savings Association Insurance Fund.

(ii) Terms and conditions. Any loan from any Federal home loan bank under clause (i) to the Savings Association Insurance Fund shall --

(I) bear a rate of interest of not less than such bank's current marginal cost of funds, taking in to account the maturities involved;

(II) be adequately secured, as determined by the Federal Housing Finance Board;

(III) be a direct liability of such Fund; and

(IV) be subject to the limitations of section 15(c) [12 USCS § 1825(c)].

(J) Authorization of appropriations. There are authorized to be appropriated to the Secretary of the Treasury, such sums as may be necessary to carry out the provisions of this paragraph, except that --

(i) the annual amount appropriated under subparagraph (F) shall not exceed $2,000,000,000 in either fiscal year 1992 or fiscal year 1993; and

(ii) the cumulative amount appropriated under subparagraph (F)

for fiscal years 1992 through 2000 shall not exceed $16,000,000,000.

(7) Provisions applicable to maintenance of accounts.

(A) Corporation's authority. Any provision of this Act forbidding the commingling of the Bank Insurance Fund with the Savings Association Insurance Fund, or requiring the separate maintenance of the Bank Insurance Fund and the Savings Association Insurance Fund, is not intended --

(i) to limit or impair the authority of the Corporation to use the same facilities and resources in the course of conducting supervisory, regulatory, conservatorship,

receivership, or liquidation functions with respect to banks and savings associations, or to integrate such functions; or

(ii) to limit or impair the Corporation's power to combine assets or liabilities belonging to banks and savings associations in the conservatorship or receivership for managerial purposes, or to limit or impair the Corporation's power to dispose of such assets or liabilities on an aggregate basis.

(B) Accounting requirements.

(i) Accounting for use of facilities and resources. The Corporation shall keep a full and complete

accounting of all costs and expenses associated with the use of any facility or resource used in the course of any function specified in subparagraph (A)(i) and shall allocate, in the manner provided in subparagraph (C), any such costs and expenses incurred by the Corporation--

(I) with respect to Bank Insurance Fund members to the Bank Insurance Fund; and

(II) with respect to Savings Association Insurance Fund members to the Savings Association Insurance Fund.

(ii) Accounting for holding and managing assets and liabilities. The Corporation shall keep a full and complete accounting of all costs and expenses associated with the holding and management of any asset or liability specified in subparagraph (A)(ii).

(iii) Accounting for disposition of assets and liabilities. The Corporation shall keep a full and complete accounting of all expenses and receipts associated with the holding and management of any asset or liability specified in subparagraph (A)(ii).

(iv) Allocation of cost, expenses and receipts. The Corporation shall

allocate an cost, expense, and receipt described in clause (ii) or clause (iii) which is associated with any asset or liability belonging to --

(I) any Bank Insurance Fund member to the Bank Insurance Fund; and

(II) any Savings Association Insurance Fund member to the Savings Association Insurance Fund.

(C) Allocation of administrative expenses. Any personnel, administrative, or other overhead expense of the Corporation shall be allocated --

(i) fully to the Bank Insurance Fund, if the expense was incurred directly as a result of the Corporation's responsibilities solely with respect to Bank Insurance Fund members;

(ii) fully to the Savings Association Insurance Fund, if the expense was incurred directly as a result of the Corporation's responsibilities solely with respect to Savings Association Insurance Fund members;

(iii) between the Bank Insurance Fund and the Savings Association Insurance Fund, in amounts reflecting the relative degree to which the expense was incurred as a

result of the activities of Bank Insurance Fund and Savings Association Insurance Fund members; or

(iv) between the Bank Insurance Fund and the Savings Association Insurance Fund, in amounts reflecting the relative total assets as of the end of the preceding calendar year of Bank Insurance Fund members and Savings Association Insurance Fund members, to the extent that the Board of Directors is unable to make a determination under clause (i) (ii), or (iii).

(8) Certain investment contracts not treated as insured deposits [Caution: for

prospective effective date, see Other provisions note to this section].

(A) In general. A liability of an insured depository institution shall not be treated as an insured deposit if the liability arises under any insured depository institution investment contract between any insured depository institution and any employee benefit plan which expressly permit benefit-responsive withdrawals or transfers.

(B) Definitions. For other purposes of subparagraph (A) --

(i) Benefit-responsive withdrawals or transfers. The term "benefit-responsive withdrawals or transfers" means any withdrawal or transfer of

funds (consisting of any portion of the principal and any interest credited at a rate guaranteed by the insured depository institution investment contract) during the period in which any guaranteed rate is in effect, without substantial penalty or adjustment, to pay benefits provided by the employee benefit plan or to permit a plan participant or beneficiary to redirect the investment of his or her account balance.

(ii) Employee benefit plan. the term "employee benefit plan" --

(I) has the meaning given to such term in section 3(3) of the Employee

Retirement Income Security Act of 1974 [29 USCS § 1002(3)]; and

(II) includes any plan described in section 401(d) of the Internal Revenue Code of 1986 [26 USCS § 401(d)].

(b) Liquidation as closing of bank. For the purposes of this Act an insured depository institution shall be deemed to have been closed on account or inability to meet the demands of its depositors in any case in which it has been closed for the purpose of liquidation without adequate provision being made for payment of its depositors.

(c) Appointment of Corporation as conservator or receiver.

(1) In general. Notwithstanding any other provision of Federal law, the law of any State, or the constitution of any State, the Corporation may accept appointment and act as conservator or receiver for any insured depository institution upon appointment in the manner provided in paragraph (2) or (3).

(2) Federal depository institutions.

(A) Appointment.

(i) Conservator. The Corporation may, at the discretion of the supervisory authority, be appointed conservator of any insured Federal depository institution or District bank and the Corporation may accept such appointment.

(ii) Receiver. The Corporation shall be appointed receiver, and shall accept such appointment, whenever a receiver is appointed for the purpose of liquidation or winding up the affairs of an insured Federal depository institution or District bank by the appropriate Federal banking agency, notwithstanding any other provision of Federal law (other than section 21A of the Federal Home Loan Bank Act [12 USCS § 1441a]) or the code of law for the District of Columbia.

(B) Additional powers. In addition to and not in derogation of the powers conferred and the duties imposed by this section on the Corporation as conservator or receiver, the Corporation,

to the extent not inconsistent with such powers and duties, shall have any other power conferred on or any duty (which is related to the exercise of such power) imposed on a conservator or receiver for any Federal depository institution under any other provision of law.

(C) Corporation not subject to any other agency. When acting as conservator or receiver pursuant to an appointment described in subparagraph (A), the Corporation shall not be subject to the direction or supervision of any other agency or department of the United States or any State in the exercise of the Corporation's rights, powers, and privileges.

(D) Depository institution in conservatorship subject to banking agency supervision. Notwithstanding subparagraph (C), any Federal depository institution for which the Corporation has been appointed conservator shall remain subject to the supervision of the appropriate Federal banking agency.

(3) Insured State depository institutions.

(A) Appointment by appropriate State supervisor. Whenever the authority having supervision of any insured State depository institution (other than a District depository institution) appoints a conservator or receiver for such institution and tenders appointment to

the Corporation, the Corportion may accept such appointment.

(B) Additional powers. In addition to the powers conferred and the duties related to the exercise of such powers imposed by State law on any conservator or receiver appointed under the law of such State for an insured State depository institution, the Corporation, as conservator or receiver pursuant to an appointment described in subparagraph (A), shall have the powers conferred and the duties imposed by this section on the Corporation as conservator or receiver.

(C) Corporation not subject to any other agency. When acting as conservator or receiver pursuant to an

appointment described in subparagraph (A), the Corporation shall not be subject to the direction or supervision of any other agency or department of the United States or any State in the agency or department of the United States or any State in the exercise of its rights, power and privileges.

(D) Depository institution in conservatorship subject to banking agency supervision. Notwithstanding subparagraph (C), any insured State depository institution for which the Corporation has been appointed conservator shall remain subject to the supervision of the appropriate State bank or savings association supervisor.

(4) Appointment of Corporation by the Corporation. Except as otherwise provided in section 21A of the Federal Home Loan Bank Act [12 USCS § 1441a] and notwithstanding any provision of Federal law, the law of any State, or the constitution of any State, the Corporation may appoint itself as sole conservator or receiver of any insured State depository institution if --

(A) the Corporation determines --

(i) that --

(I) a conservator, receiver or other legal custodian has been appointed for such institution;

(II) such institution has been subject to the appointment of any such conservator, receiver, or custodian for a period of at least 15 consecutive days; and

(III) 1 or more of the depositors in such institution is unable to withdraw any amount of any insured deposit; or

(ii) that such institution has been closed by or under the laws of any State; and

(B) the Corporation determines that 1 or more of the grounds specified in paragraph (5) --

(i) existed with respect to such institution at the time --

(I) the conservator, receiver, or other legal custodian was appointed; or

(II) such institution was closed; or

(ii) exist at any time -

(I) during the appointment of the conservator, receiver or other legal custodian; or

(II) while such institution is closed.

(5) Grounds for appointing conservator or receiver. The grounds for appointing a conservator or receiver (which may be the Corporation) for any insured depository institution are as follows:

(A) Assets insufficient for obligations. The institution's assets are less than the institution's obligations to its creditors and others, including members of the institution.

(B) Substantial dissipation. Substantial dissipation of assets or earnings due to --

(i) any violation of any statute or regulation; or

(ii) any unsafe or unsound practice.

(C) Unsafe or unsound condition. An unsafe or unsound condition to transact business.

(D) Cease and desist orders. Any willful violation of a cease-and-desist order which has become final.

(E) Concealment. Any concealment of the institution's books, papers, records, or assets, or any refusal to submit the institution's books, papers, records, or affairs for inspection to any examiner or to any lawful agent of the appropriate Federal banking agency or State bank or savings association supervisor.

(F) Inability to meet obligations. The institution is likely to be unable to pay its obligations or meet its depositors' demands in the normal course of business.

(G) Losses. The institution has incurred or is likely to incur losses that will deplete all or substantially all of its capital, and there is no reasonable prospect for the institution to become adequately capitalized (as defined in section 38(b)) [12 USCS § 1831o(b)] without Federal assistance.

(H) Violations of law. Any violation of any law or regulation, or any unsafe or unsound practice or condition that is likely to -

(i) cause insolvency or substantial dissipation of assets or earnings;

(ii) weaken the institution's condition; or

(iii) otherwise seriously prejudice the interests of the institution's depositors or the deposit insurance fund.

(I) Consent. The institution, by resolution of its board of directors or its shareholders or members, consents to the appointment.

(J) Cessation of insured statues. the institution ceases to be an insured institution.

(K) Undercapitalization. The institution is undercapitalized (as defined in section 38(b) [12 USCS § 1831o(b)], and --

(i) has no reasonable prospect of becoming adequately capitalized (as defined in that section);

(ii) fails to become adequately capitalized when required to do so under section 38(f)(2)(A)[12 USCS § 1831o(f)(2)(A)];

(iii) fails to submit a capital restoration plan acceptable to that agency within the time prescribed under section 38(e)(2)(D) [12 USCS § 1831o(e)(2)(D)]; or

(iv) materially fails to implement a capital restoration plan submitted and accepted under section 38(e)(2) [12 USCS § 1831o(e)(2)].

(L) The institution --

(i) is critically undercapitalized, as defined in section 38(b) [12 USCS § 1831o(b)]; or

(ii) otherwise has substantially insufficient capital.

(M) Money laundering offense. The Attorney General notifies the appropriate Federal banking agency or the Corporation in writing that the insured depository institution has been found guilty of a criminal offense under

section 1956 or 1956 of title 18, United States Code, or section 5322 of title 31, United States Code.

(6) Appointment by Director of the Office of Thrift Supervision.

(A) Conservator. The Corporation or the Resolution Trust Corporation may, at the discretion of the Director of the Office of the Thrift Supervision, be appointed conservator and the Corporation may accept any such appointment.

(B) Receiver. Whenever the Director of the Office of Thrift Supervision appoints a receiver under the provisions of subparagraph (A) or (C) of section 5(d)(2) of the Home Owners' Loan

Act [12 USCS § 1464(d)(2)(A) or (C)] for the purpose of liquidation or winding up any savings association's affairs --

(i) before October 1, 1993, the Resolution Trust Corporation shall be appointed;

(ii) after September 30, 1993, the Resolution Trust Corporation shall be appointed if the Resolution Trust Corporation had been placed in control of the depository institution at any time on or before such date; and

(iii) after September 30, 1993, the Corporation shall be appointed unless the Resolution Trust

Corporation is required to be appointed under clause (ii).

(7) Judicial review. If the Corporation appoints itself as conservator or receiver under paragraph (4), the insured State depository institution may, within 30 days thereafter, bring an action in the United States district court for the judicial district in which the home office of such institution is located, or in the United States District Court for the District of Columbia, for an order requiring the Corporation to remove itself as such conservator or receiver, and the court shall, upon the merits, dismiss such action or direct the Corporation to remove itself as such conservator or receiver.

(8) Replacement of conservator of State depository institution.

(A) In general. In the case of any insured State depository institution for which the Corporation appointed itself as conservator pursuant to paragraph (4), the Corporation may, without any requirement of notice, hearing, or other action, replace itself as conservator with itself as receiver of such institution.

(B) Replacement treated as removal of incumbent. The replacement of a conservator with a receiver under subparagraph (A) shall be treated as the removal of the Corporation as conservator.

(C) Right of review of original appointment not affected. The replacement of a conservator with a receiver under subparagraph (A) shall not affect any right of the insured State depository institution to obtain review, pursuant to paragraph (7), of the original appointment of the conservator.

(9) Appropriate Federal banking agency may appoint corporation a conservator or receiver for insured state depository institution to carry out section 38 [12 USCS § 1831o].

(A) In general. The appropriate Federal banking agency may appoint the Corporation as sole receiver (or, subject to paragraph (11), sole conservator) of any insured State depository institution,

after consultation with the appropriate State supervisor, if the appropriate Federal banking agency determines that -

(i) 1 or more of the grounds specified in subparagraph (K) and (L) of paragraph (5) exist with respect to that institution; and

(ii) the appointment is necessary to carry out the purpose of section 38 [12 USCS § 1831o].

(B) Nondelegation. The appropriate Federal banking agency shall not delegate any action under subparagraph (A).

(10) Corporation may appoint itself as conservator or receiver for insured

depository institution to prevent loss to deposit insurance fund. The Board of Directors may appoint the Corporation as sole conservator or receiver of an insured depository institution, after consultation with the appropriate Federal banking agency and the appropriate State supervisor (if any), if the Board of Directors determines that --

(A) 1 or more of the grounds specified in any subparagraph of paragraph (5) exist with respect to the institution; and

(B) the appointment is necessary to reduce --

(i) the risk that the deposit insurance fund would incur a loss

with respect to the insured depository institution, or

(ii) any loss that the deposit insurance fund is expected to incur with respect to that institution.

(11) Appropriate federal banking agency shall not appoint conservator under certain provisions without giving corporation opportunity to appoint receiver. The appropriate Federal banking agency shall not appoint a conservator for an insured depository institution under subparagraph (K) or (L) or paragraph (5) without the Corporation's consent unless the agency has given the Corporation 48 hours notice of the agency's intention to appoint the

conservator and the grounds for the appointment.

(12) Directors not liable for acquiescing in appointment of conservator or receiver. The members of the board of directors of an insured depository institution shall not be liable to the institution's shareholders or creditors for acquiescing in or consenting in good faith to --

(A) the appointment of the Corporation or the Resolution Trust Corporation as conservator or receiver for that institution; or

(B) an acquisition or combination under section

38(f)(2)(A)(iii) [12 USCS § 1831o(f)(2)(A)(iii).

(13) Additional powers. In any case which the Corporation is appointed conservator or receiver under paragraph (4), (6), (9), or (10) for any insured State depository institution -

(A) subject to paragraph (B), this section shall apply to the Corporation as conservator or receiver in the same manner and to the same extent as if that institution were a Federal depository institution for which the Corporation had been appointed conservator or receiver;

(B) the Corporation shall apply the law of the State in which the

institution is chartered insofar as that law gives the claims of depositors priority over those of other creditors or claimants; and

(C) the Corporation as receiver of the institution may --

(i) liquidate the institution in an orderly manner; and

(ii) make any other disposition of any matter concerning the institution, as the Corporation determines is in the best interests of the institution, the depositors of the institution, and the Corporation.

(d) Powers and duties of Corporation as conservator or receiver.

(1) Rulemaking authority of Corporation. The Corporation may prescribe such regulations as the Corporation determines to be appropriate regarding the conduct of conservatorships or receiverships.

(2) General powers.

(A) Successor to institution. The Corporation shall, as conservator or receiver, and by operation of law, succeed to --

(i) all rights, titles, powers, and privileges of the insured depository institution, and of any stockholder

member, accountholder, depositor, officer, or director of such institution with respect to the institution and the assets of the institution; and

(ii) title to the books, records, and assets of any previous conservator or other legal custodian of such institution.

(B) Operate the institution. The Corporation may (subject to the provisions of section 40 [12 USCS § 1831q]), as conservator or receiver --

(i) take over the assets of and operate the insured depository institution with all the powers of the members or shareholders, the

directors, and the officers of the institution and conduct all business of the institution;

(ii) collect all obligations and money due the institution.

(iii) perform all functions of the institution in the name of the institution which is consistent with the appointment a conservator or receiver; and

(iv) preserve and conserve the assets and property of such institution.

(C) Functions of institution's officers, directors, and shareholders. The Corporation may, by regulation or

order, provide for the exercise of any function by any member or stockholder, director, or officer of any insured depository institution for which the Corporation has been appointed conservator or receiver.

(D) Powers as conservator. The Corporation may, as conservator, take such actions as may be --

(i) necessary to put the insured depository institution in a sound and solvent condition; and

(ii) appropriate to carry on the business of the institution and preserve and conserve the assets and property of the institution.

(E) Additional powers as receiver. The Corporation may (subject to the provisions of section 40 [12 USCS § 1831q]), as receiver, place the insured depository institution in liquidation and proceed to realize upon the assets of the institution, having due regard to the conditions of creditor in the locality.

(F) Organization of new institutions. The Corporation may, as receiver --

(i) with respect to savings associations and by application to the Director of the Office of Thrift Supervision, organize a new Federal savings association to take over such assets or such liabilities as

the Corporation may determine to be appropriate; and

(ii) with respect to any insured bank, organize a new national bank under subsection (m) or a bridge bank under subsection (n).

(G) Merger, transfer of assets and liabilities.

(i) In general. The Corporation may, as conservator or receiver -

(I) merge the insured depository institution with another insured depository institution; or

(II) subject to clause (ii), transfer any asset or liability of

the institution in default (including assets and liabilities associated with any trust business) without any approval, assignment, or consent with respect to such transfer.

(ii) Approval by appropriate Federal banking agency. No transfer described in clause (i)(II) may be made to another depository institution (other than a new bank or a bridge bank established pursuant to subject (m) or (n)) without the approval of the appropriate Federal banking agency for such institution.

(H) Payment of valid obligations. The Corporation, as

conservator or receiver, shall pay all valid obligations of the insured depository institution in accordance with the prescriptions and limitations of this Act.

(I) Subpoena authority.

(i) In general. The Corporation may, as conservator, receiver or exclusive manager and for purposes of carrying out any power, authority, or duty with respect to an insured depository institution (including determining any claim against the institution and determining and realizing upon any asset of any person in the course of collecting money due the institution), exercise any power

established under section 8(n) [12 USCS § 1818(n)], and the provisions of such section shall apply with respect to the exercise of any such power under this subparagraph in the same manner as such provisions apply under such section.

(ii) Authority of board of directors. A subpoena duces tecum may be issued under clause (i) only by, or with the written approval of, the Board of Directors or their designees (or, in the case of a subpoena or subpoena duces tecum issued by the Resolution Trust Corporation under this subparagraph and section 21A(b)(4), only by, or with the written approval of, the

Board of Directors of such Corporation or their designees).

(iii) Rule of construction. This subsection shall not be construed as limiting any rights that the Corporation, in any capacity, might otherwise have under section 10(c) or this Act [12 USCS § 1820(c)].

(J) Incidental powers. The Corporation may, as conservator or receiver --

(i) exercise all powers and authorities specifically granted to conservators or receivers, respectively, under this Act and such incidental powers as shall be

necessary to carry out such powers; and

(ii) take any action authorized by this Act, which the Corporation determines is in the best interests of the depository institution, its depositors, or the Corporation.

(K) Utilization of private sector. In carrying out its responsibilities in the management and disposition of assets from insured depository institutions, as conservator, receiver, or in its corporate capacity, the Corporation shall utilize the services of private persons, including real estate and loan portfolio asset management, property management, auction marketing, and brokerage services, if such service are available

in the private sector and the Corporation determines utilization of such services is practicable, efficient, and cost effective.

(3) Authority of receiver to determine claims.

(A) In general. The Corporation may, as receiver, determine claims in accordance with the requirements of this subsection and regulations prescribed under paragraph (4).

(B) Notice requirements. The receiver, in any case involving the liquidation or winding up of the affairs of a closed depository institution, shall --

(i) promptly publish a notice to the depository institution's creditors to present their claims, together with proof, to the receiver by a date specified in the notice which shall not be less than 90 days after the publication of such notice; and

(ii) republish such notice approximately 1 month and 2 months, respectively, after the publication under clause (i).

(C) Mailing required. The receiver shall mail a notice similar to the notice such published under subparagraph (B)(i) at the time of publication to any creditor shown on the institution's books --

(i) at the creditor's last address appearing in such books; or

(ii) upon discovery of the name and address of a claimant not appearing on the institution's books within 30 days after the discovery of such name and address.

(4) Rulemaking authority relating to determination of claims.

(A) In general. The Corporation may prescribe regulations regarding the allowance or disallowance of claims by the receiver and providing for administrative determination of claims and review of such determination.

(B) Final settlement payment procedure.

(i) In general. In the handling of receiverships of insured depository institutions, to maintain essential liquidity and to prevent financial disruption, the Corporation may, after the declaration of an institution's insolvency, settle all uninsured and unsecured claims on the receivership with a final settlement payment which shall constitute full payment and disposition of the Corporation's obligations to such claimants.

(ii) Final settlement payment. For purposes of clause (i), a final settlement payment shall be payment

of an amount equal to the product of the final settlement payment rate and the amount of the uninsured and unsecured claim on the receivership; and

(iii) Final settlement payment rate. For the purposes of clause (ii), the final settlement payment rate shall be a percentage rate reflecting an average of the Corporation's receivership recovery experience, determined by the Corporation in such a way that over such time period as the Corporation may deem appropriate, the Corporation in total will receive no more or less than it would have received in total as a general creditor standing in

the place of insured depositors in each specific receivership.

(iv) Corporation authority. The Corporation may undertake such supervisory actions and promulgate such regulations as may be necessary to assure that the requirements of this section can be implemented with respect to each insured depository institution in the event of its insolvency.

(5) Procedures for determination of claims.

(A) Determination period.

(i) In general. Before the end of the 180-day period beginning on the

date any claim against a depository institution is filed with the Corporation as receiver, the Corporation shall determine whether to allow or disallow the claim and shall notify the claimant of any determination with respect to such claim.

(ii) Extension of time. The period described in clause (i) may be extended by a written agreement between the claimant and the Corporation.

(iii) Mailing of notice sufficient. The requirements of clause (i) shall be deemed to be satisfied if the notice of any determination with respect to any claim is mailed to

the last address of the claimant which appears--

(I) on the depository institution's books;

(II) in the claim filed by the claimant; or

(III) in documents submitted in proof of claim.

(iv) Contents of notice of disallowance. If any claim filed under clause (i) is disallowed, the notice of the claimant shall contain--

(I) a statement of each reach for the disallowance; and

(II) the procedures available for obtaining agency review of the determination to disallow the claim or judicial determination of the claim.

(B) Allowance of proven claims. The receiver shall allow any claim received on or before the date specified in the notice published under paragraph (3)(B)(i) by the receiver from any claimant which is proved to the satisfaction of the receiver.

(C) Disallowance of claims filed after end of filing period.

(i) In general. Except as provided in clause (ii), claims filed after the date specified in the notice

published under paragraph (3)(B)(i) shall be disallowed and such disallowance shall be final.

(ii) Certain exceptions. Clause (i) shall not apply with respect to any claim filed by any claimant after the date specified in the notice published under paragraph (3)(B)(i) and such claim may be considered by the receiver if -

(I) the claimant did not receive notice of the appointment of the receiver in time to file such claim before such date; and

(II) such claim is filed in time to permit payment of such claim.

(D) Authority to disallow claims.

(i) In general. The receiver may disallow any portion of any claim by a creditor or claim of security, preference, or priority which is not provided to the satisfaction of the receiver.

(ii) Payments to less than fully secured creditors. In the case of a claim of a creditor against an insured depository institution which is secured by any property or other asset of such institution, any receiver appointed for any insured depository institution --

(I) may treat the portion of such claim which exceeds an amount equal to the fair market value of such property or other asset as an unsecured claim against the institution; and

(II) may not make any payment with respect to such unsecured portion of the claim other than in connection with the disposition of all claims of unsecured creditors of the institution.

(iii) Exceptions. No provision of this paragraph shall apply with respect to --

(I) any extension of credit from any Federal home loan bank or

Federal Reserve bank to any insured depository institution; or

(II) any security interest in the assets of the institution securing any such extension of creditor.

(E) No judicial review of determination pursuant to subparagraph (D). No court may review the Corporation's determination pursuant to subparagraph (D) to disallow a claim.

(F) Legal effect of filing.

(i) Statute of limitation tolled. For purposes of any applicable statute of limitations, the filing of a claim with the receiver shall

constitute a commencement of an action.

(ii) No prejudice to other actions. Subject to paragraph (12), the filing of a claim with the receiver shall not prejudice any right of the claimant to continue any action which was filed before the appointment of the receiver.

(6) Provision for agency review or judicial determination of claims.

(A) In general. Before the end of the 60-day period beginning on the earlier of --

(i) the end of the period described in paragraph (5)(A)(i) with respect

to any claim against a depository institution for which the Corporation is receiver; or

(ii) the date of any notice of disallowance of such claim pursuant to paragraph (5)(A)(i).

the claimant may request administrative review of the claim in accordance with subparagraph (A) or (B) of paragraph (7) or file suit on such claim (or continue an action commenced before the appointment of the receiver) in the district or territorial court of the United States for the district within which the depository institution's principal place of business is located or the United Statues District Court for the District of Columbia (and such court

shall have jurisdiction to hear such claim).

(B) Statute of limitations. If any claimant fails to --

(i) request administrative review of any claim in accordance with subparagraph (A) or (B) of paragraph (7); or

(ii) file on such claim (or continue an action commenced before the appointment of the receiver),

before the end of the 60-day period described in subparagraph (A), the claim shall be deemed to be disallowed (other than any portion of such claim which was allowed by the receiver) as of the end of

such period, such disallowance shall be final, and the claimant shall have no further rights or remedies with respect to such claim.

(7) Review of claims.

(A) Administrative hearing. If any claimant requests review under this subparagraph in lieu of filing or continuing any action under paragraph (6) and the Corporation agrees to such request, the Corporation shall consider the claim after opportunity for a hearing on the record. The final determination of the Corporation with respect to such cliam shall be subject to judicial review under chapter 7 of title 5, United States Code [5 USCS §§ 701 et seq.].

(B) Other review procedures.

(i) in general. The Corporation shall also establish such alternative dispute resolution processes as may be appropriate for the resolution of claims filed under paragraph (5)(A)(i).

(ii) Criteria. In establising alternative dispute resolution processes, the Corporation shall strive for procedures which are expeditious, fair, independent, and low cost.

(iii) Voluntary binding or nonbinding procedures. The Corporation may establish both binding and nonbinding processes,

which may be conducted by any government or private party, but all parties, including the claimant and the Corporation, must agree to the use of the process in a particular case.

(iv) Consideration of incentives. The Corporation shall seek to develop incentives for claimants to participate in the alternative dispute resolution process.

(8) Expedited determination of claims.

(A) Establishment required. The Corporation shall establish a procedure for expedited relief outside of the

routine claims process established under paragragh (5) for claimants who --

(i) allege the existence of legally valid and enforceable or perfected security interests in assets of any depository institution for which the Corporation has been appointed receiver; and

(ii) allege that irreparable injury will occur if the routine claims procedure is followed.

(B) Determination period. Before the end of the 90-day period beginning on the date any claim is filed in accordance with the procedures established pursuant to subparagraph (A), the Corporation shall --

(i) determine --

(I) whether to allow or disallow such claim; or

(II) whether such claim should be determined pursuant to the procedures established pursuant to paragraph (5); and

(ii) notify the claimant of the determination, and if the claim is disallowed, a statement of each reason for the disallowance and the procedure for obtaining agency review or judicial determination.

(C) Period for filing or renewing suit. Any claimant who files a request for expedited relief shall be

permitted to file a suit, or to continue a suit filed before the appointment of the receiver, seeking a determination of the claimant's rights with respect to such security interest after the earlier of --

(i) the end of the 90-day period beginning on the date of the filing of a request for expedited relief; or

(ii) the date the Corporation denies the claim.

(D) Statute of limitations. If an action described in subparagraph (C) is not filed, or the motion to renew a previously filed suit is not made, before the end of the 30-day period beginning on

the date on which such action or motion may be filed in accordance with subparagraph (B), the claim shall be deemed to be disallowed as of the end of such period (other than any portion of such claim which was allowed by the receiver), such disallowance shall be final, and the claimant shall have no further right or remedies with respect to such claim.

(E) Legal effect of filing.

(i) Statute of limitation tolled. For purposes of any applicable statute of limitations, the filing of a claim with the receiver shall constitute a commencement of an action.

(ii) No prejudice to other actions. Subject to paragraph (12), the filing of a claim with the receiver shall not prejudice any right of the claimant to continue any action which was filed before the appointment of the receiver.

(9) Agreement as basis of claim.

(A) Requirements. Except as provided in subparagraph (B), any agreement which does not meet the requirements set forth in section 13(e) [12 USCS § 1823(e)] shall not form the basis of, or substantially compromise, a claim against the receiver or the Corporation.

(B) Exception to contemporaneous execution requirement. Notwithstanding section 13(e)(2) [12 USCS § 1823(e)(2)], any agreement relating to an extension of credit between a Federal home loan bank or Federal Reserve bank and any insured depository institution which was executed before the extension of credit by such bank to such institution shall be treated a having been executed contemporaneously with such extension of creditor for purposes of subparagraph (A).

(10) Payment of claims.

(A) In general. The receiver may, in the receiver's discretion and to the extent funds are available, pay creditor claims which are allowed by the receiver, approved by the Corporation

pursuant to a final determination pursuant to paragraph (7) or (8), or determined by the final judgment of any court of competent jurisdiction in such manner and amounts as are authorized under this Act.

(B) Payment of dividends on claims. The receiver may, in the receiver's sole discretion, pay dividends on proved claims at any time, and no liability shall attach to the Corporation (in such Corporation's corporate capacity or as receiver), by reason of any such payment, for failure to pay dividends to a claimant whose claim is not proved at the time of any such payment.

(11) Distribution of assets.

(A) Subrogated claims; claims of uninsured depositors and other creditors. The receiver shall --

(i) retain for the account of the Corporation such portion of the amounts realized from any liquidation as the Corporation may be entitled to receive in connection with the subrogation of the claims of depositors; and

(ii) pay to depositors and other creditors the net amounts available for distribution to them.

(B) Distribution to shareholders of amounts remaining after payment of all other claims and expenses. In any case in which funds remain after all

depositors, creditors, other claimants, and administrative expenses are paid, the receiver shall distribute such funds to the depository institution's shareholders or members together with the accounting report required under paragraph (15)(B).

(12) Suspension of legal actions.

(A) In general. After the appointment of a conservator or receiver for an insured depository institution, the conservator or receiver may request a stay for a period not to exceed --

(i) 45 days, in the case of any conservator; and

(ii) 90 days, in the case of any receiver, in any judicial action or

proceeding to which such institution is or becomes a party.

(B) Grant of stay by all courts required. Upon receipt of a request by any conservator or receiver pursuant to subparagraph (A) for a stay of any judicial action or proceeding in any court with jurisdiction of such action or proceeding, the court shall grant such stay as to all parties.

(13) Additional rights and duties.

(A) Prior final adjudication. The Corporation shall abide by any final unappealable judgment of any court of competent jurisdiction which was rendered before the appointment of the Corporation a conservator or receiver.

(B) Rights and remedies of conservator or receiver. In the event of any appealable judgment, the Corporation as conservator or receiver shall -

(i) have all the rights and remedies available to the insured depository institution (before the appointment of such conservator or receiver) and the Corporation in its corporate capacity, including removal to Federal court and all appellate rights; and

(ii) not be required to post any bond in order to pursue such remedies.

(C) No attachment or execution. No attachment or execution may issue by

any court upon assets in the possession of the receiver.

(D) Limitation on judicial review. Except as otherwise provided in this subsection, no court shall have jurisdiction over --

(i) any claim or action for payment from, or any action seeking a determination of rights with respect to, the assets of any depository institution for which the Corporation has been appointed receiver, including assets which the Corporation may acquire from itself as such receiver; or

(ii) any claim relating to any act or omission of such institution or the Corporation as receiver.

(E) Disposition of assets. In exercising any right, power, privilege, or authority as conservator or receiver in connection with any sale or disposition of assets of any insured depository institution for which the Corporation has been appointed conservator or receiver, including any sale or disposition of assets acquired by the Corporation under section 13(d)(1) [12 USCS § 1823(d)(1)], the Corporation shall conduct its operations in a manner which --

(i) maximizes the net present value return from the sale or disposition of such assets;

(ii) minimizes the amount of any loss realized in the resolution of cases;

(iii) ensures adequate competition and fair and consistent treatment of offerors;

(iv) prohibits discrimination on the basis of race, sex, or ethnic groups in the solicitation and consideration of offers; and

(v) maximizes the preservation of the availability and affordability of residential real property for

low- and moderate-income individuals.

(14) Statute of limitations for actions brought by conservator or receiver.

(A) In general. Notwithstanding any provision of any contract, the applicable statute of limitations with regard to any action brought by the Corporation as conservator or receiver shall be--

(i) in the case of any contract claim, the longer of--

(I) the 6-year period beginning on the date the claim accrues; or

(II) the period applicable under State law; and

(ii) in the case of any tort claim, the longer of --

(I) the 3-year period beginning on the date the claim accrues; or

(II) the period applicable under State law.

(B) Determination of the date on which a claim accrues. For purposes of subparagraph (A), the date on which the statute of limitation begins to run on any claim described in such subparagraph shall be the later of --

(i) the date of the appointment of the Corporation as conservator or receiver; or

(ii) the date on which the cause of action accrues.

(15) Accounting and recordkeeping requirements.

(A) In general. The Corporation as conservator or receiver shall, consistent with the accounting and reporting practices and procedures established by the Corporation, maintain a full accounting of each conservatorship and receivership or other disposition of institutions in default.

(B) Annual accounting or report. With respect to each conservatorship or receivership to which the Corporation was appointed, the Corporation shall make an annual accounting or report, as appropriate, available to the Secretary of the Treasury, the Comptroller General of the United States, and the authority which appointed the Corporation as conservator or receiver.

(C) Availability of reports. Any report prepared pursuant to subparagraph (B) shall be made available by the Corporation upon request to any shareholder of the depository institution for which the Corporation was appointed conservator or receiver or any other member of the public.

(D) Recordkeeping requirement. After the end of the 6-year period beginning on the date the Corporation is appointed as receiver of an insured depository institution, the Corporation may destroy any records of such institution which the Corporation, in the Corporation's discretion, determines to be unnecessary unless directed not to do so by a court of competent jurisdiction or governmental agency, or prohibited by law.

(16) Contracts with State housing finance authorities.

(A) In general. The Corporation may enter into contracts with any State housing finance authority for the sale of mortgage-related assets (as such terms

are defined in section 1301 of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 [12 USCS § 144a-1]) of any depository institution in default (including any assets and liabilities associated with any trust business), such contracts to be effective in accordance with their terms without any further approval, assignment, or consent with respect thereto.

(B) Factors to consider. In evaluating the disposition of mortgage related assets to any State housing finance authority the Corporation shall consider--

(i) the State housing finance authority's ability to acquire and

service current, delinquent, and defaulted mortgage related assets;

(ii) the State housing finance authority's ability to further national housing policies;

(iii) the State housing finance authority's sensitivity to the impact of the sale of mortgage related assets upon the State and local communities;

(iv) the costs to the Federal Government associated with alternative ownership or dispositions of the mortgage related assets;

(v) the minimization of future guaranties which may be required of the Federal Government;

(vi) the maximization of mortgage related asset values; and

(vii) the utilization of institutions currently established in mortgage related asset market activities.

(17) Fraudulent transfers.

(A) In general. The Corporation, as conservator or receiver for any insured depository institution, and any conservator appointed by the Comptroller of the Currency or the Director of the Office of Thrift Supervision may avoid a

transfer of any interest of an institution-affiliated party, or any person who the Corporation or conservator determines is a debtor of the institution, in property, or any obligation incurred by such party or person, that was made within 5 years of the date on which the Corporation or conservator was appointed conservator or receiver if such party or person voluntarily or involuntarily made such transfer or incurred such liability with the intent to hinder, delay, or defraud the insured depository institution, the Corporation or other conservator, or any other appropriate Federal banking agency.

(B) Right of recovery. To the extent a transfer is avoided under subparagraph (A), the Corporation or any conservator

described in such subparagraph may recover, for the benefit of the insured depository institution, the property transferred, or, if a court so orders, the value of such property (at the time of such transfer) from--

(i) the initial transferee of such transfer or the institution-affiliated party or person for whose benefit such transfer was made; or

(ii) any immediate or mediate transferee of any such initial transferee.

(C) Rights of transferee or obligee. The Corporation or any conservator described in subparagraph (A)

may not recover under subparagraph (B) from--

(i) any transferee that takes for value, including satisfaction or securing of a present or antecedent debt, in good faith; or

(ii) any immediate or mediate good faith transferee of such transferee.

(D) Rights under this paragraph. The rights under this paragraph of the Corporation and any conservator described in subparagraph (A) shall be superior to any rights of a trustee or any other party (other than any party which is a Federal agency) under title 11 United States Code.

(18) Attachment of assets and other injunctive relief. Subject to paragraph (19), any court of competent jurisdiction may, at the request of--

(A) the Corporation (in the Corporation's capacity as conservator or receiver for any insured depository institution or in the Corporation's corporate capacity with respect to any asset acquired or liability assumed by the Corporation under section 11, 12, or 13 [12 USCS § 1821, 1822, or 1823]); or

(B) any conservator appointed by the Comptroller of the Currency or the Director of the Office of Thrift Supervision, issue an order in accordance with Rule 65 of the Federal Rules of Civil Procedure, including an order

placing the assets of any person designated by the Corporation or such conservator under the control of the court and appointing a trustee to hold such assets.

(19) Standards.

(A) Showing. Rule 65 of the Federal Rules of Civil Procedure shall apply with respect to any proceeding under paragraph (18) without regard to the requirement of such rule that the applicant show that the injury, loss, or damage is irreparable and immediate.

(B) State proceeding. If, in the case of any proceeding in a State court, the court determines that rules of civil procedure available under the laws

of such State provide substantially similar protections to such party's right to due process as Rule 65 (as modified with respect to such proceeding by subparagraph (A)), the relief sought by the Corporation or a conservator pursuant to paragraph (18) may be requested under the laws of such State.

(e) Provisions relating to contracts entered into before appointment of conservator or receiver.

(1) Authority to repudiate contracts. In addition to any other rights a conservator or receiver may have, the conservator or receiver for any insured depository institution may disaffirm or repudiate any contract or lease--

(A) to which such institution is a party;

(B) the performance of which the conservator or receiver, in the conservator's or receiver's discretion, determines to be burdensome; and

(C) the disaffirmance or repudiation of which the conservator or receiver determines, in the conservator's or receiver's discretion, will promote the orderly administration of the institution's affairs.

(2) Timing of repudiation. The conservator or receiver appointed for any insured depository institution in accordance with subsection (c) shall determine whether or not to exercise the

rights of repudiation under this subsection within a reasonable period following such appointment.

(3) Claims for damages for repudiation.

(A) In general. Except as otherwise provided in subparagraph (C) and paragraphs (4), (5), and (6), the liability of the conservator or receiver for the disaffirmance or repudiation of any contract pursuant to paragraph (1) shall be--

(i) limited to actual direct compensatory damages; and

(ii) determined as of--

(I) the date of the appointment of the conservator or receiver; or

(II) in the case of any contract or agreement referred to in paragraph (8), the date of the disaffirmance or repudiation of such contract or agreement.

(B) No liability for other damages. For purposes of subparagraph (A), the term "actual direct compensatory damages" does not include--

(i) punitive or exemplary damages;

(ii) damages for lost profits or opportunity; or

(iii) damages for pain and suffering.

(C) Measure of damages for repudiation of financial contracts. In the case of any qualified financial contract or agreement to which paragraph (8) applies, compensatory damages shall be--

(i) deemed to include normal and reasonable costs of cover or other reasonable measures of damages utilized in the industries for such contract and agreement claims; and

(ii) paid in accordance with this subsection and subsection (i) except as otherwise specifically provided in this section.

(4) Leases under which the institution is the lessee.

(A) In general. If the conservator or receiver disaffirms or repudiates a lease under which the insured depository institution was the lessee, the conservator or receiver shall not be liable for any damages (other than damages determined pursuant to subparagraph (B)) for the disaffirmance or repudiation of such lease.

(B) Payments of rent. Notwithstanding subparagraph (A), the lessor under a lease to which such subparagraph applies shall--

(i) be entitled to the contractual rent accruing before the later of the date--

(I) the notice of disaffirmance or repudiation is mailed; or

(II) the disaffirmance or repudiation becomes effective, unless the lessor is in default or breach of the terms of the lease; (ii) have no claim for damages under any acceleration clause or other penalty provision in the lease; and

(iii) have a claim for any unpaid rent, subject to all appropriate offsets and defenses, due as of the date of the appointment which shall

be paid in accordance with this subsection and subsection (i).

(5) Leases under which the institution is the lessor.

(A) In general. If the conservator or receiver repudiates an unexpired written lease of real property of the insured depository institution under which the institution is the lessor and the lessee is not, as of the date of such repudiation, in default, the lessee under such lease may either--

(i) treat the lease as terminated by such repudiation; or

(ii) remain in possession of the leasehold interest for the balance

of the term of the lease unless the lessee defaults under the terms of the lease after the date of such repudiation.

(B) Provisions applicable to lessee remaining in possession. If any lessee under a lease described in subparagraph (A) remains in possession of a leasehold interest pursuant to clause (ii) of such subparagraph--

(i) the lessee--

(I) shall continue to pay the contractual rent pursuant to the terms of the lease after the date of the repudiation of such lease;

(II) may offset against any rent payment which accrues after the date of the repudiation of the lease, any damages which accrue after such date due to the nonperformance of any obligation of the insured depository institution under the lease after such date; and

(ii) the conservator or receiver shall not be liable to the lessee for any damages arising after such date as a result of the repudiation other than the amount of any offset allowed under clause (i)(II).

(6) Contracts for the sale of real property.

(A) In general. If the conservator or receiver repudiates any contract (which meets the requirements of each paragraph of section 13(e) [12 USCS § 1823(e)]) for the sale of real property and the purchaser of such real property under such contract is in possession and is not, as of the date of such repudiation, in default, such purchaser may either--

(i) treat the contract as terminated by such repudiation; or

(ii) remain in possession of such real property.

(B) Provisions applicable to purchaser remaining in possession. If any purchaser of real property under any

contract described in subparagraph (A) remains in possession of such property pursuant to clause (ii) of such subparagraph--

(i) the purchaser--

(I) shall continue to make all payments due under the repudiation of the contract; and

(II) may offset against any such payments any damages which accrue after such date due to the nonperformance (after such date) of any obligation of the depository institution under the contract; and

(ii) the conservator or receiver shall--

(I) not be liable to the purchaser for any damages arising after such date as a result of the repudiation other than the amount of any offset allowed under clause (i)(II);

(II) deliver title to the purchaser in accordance with the provisions of the contract; and

(III) have no obligation under the contract other than the performance required under subclause (II).

(C) Assignment and sale allowed.

(i) In general. No provision of this paragraph shall be construed as

limiting the right of the conservator or receiver to assign the contract described in subparagraph (A) and sell the property subject to the contract and the provisions of this paragraph.

(ii) No liability after assignment and sale. If an assignment and sale described in clause (i) is consummated, the conservator or receiver shall have no further liability under the contract described in subparagraph (A) or with respect to the real property which was the subject of such contract.

(7) Provisions applicable to service contracts.

(A) Services performed before appointment. In the case of any contract for services between any person and any insured depository institution for which the Corporation has been appointed conservator or receiver, any claim of such person for services performed before the appointment of the conservator or receiver shall be--

(i) a claim to be paid in accordance with subsections (d) and (i); and

(ii) deemed to have arisen as of the date the conservator or receiver was appointed.

(B) Services performed after appointment and prior to repudiation. If, in the case of any contract for services

described in subparagraph (A), the conservator or receiver accepts performance by the other person before the conservator or receiver makes any determination to exercise the right of repudiation of such contract under this section--

(i) the other party shall be paid under the terms of the contract for the services performed; and

(ii) the amount of such payment shall be treated as an administrative expense of the conservatorship or receivership.

(C) Acceptance of performance no bar to subsequent repudiation. The acceptance by any conservator or receiver

of services referred to in subparagraph (B) in connection with a contract described in such subparagraph shall not affect the right of the conservator or receiver to repudiate such contract under this section at any time after such performance.

(8) Certain qualified financial contracts.

(A) Rights of parties to contracts. Subject to paragraph (10) of this subsection and notwithstanding any other provision of the Act (other than subsection (d)(9) of this section and section 13(e) [12 USCS § 1823(e)], any other Federal law, or the law of any State, no person shall be stayed or prohibited from exercising--

(i) any right to cause the termination or liquidation of any qualified financial contract with an insured depository institution which arises upon the appointment of the Corporation as receiver for such institution at any time after such appointment;

(ii) any right under any security arrangement relating to any contract or agreement described in clause (i); or

(iii) any right to offset or net out any termination value, payment amount, or other transfer obligation arising under or in connection with 1 or more contracts and agreements described in clause (i) including

any master agreement for such contracts or agreements.

(B) Applicability of other provisions. Subsection (d)(12) shall apply in the case of any judicial action or proceeding brought against any receiver referred to in subparagraph (A), or the insured depository institution for which such receiver was appointed, by any party to a contract or agreement described in subparagraph (A)(i) with such institution.

(C) Certain transfers not avoidable.

(i) In general. Notwithstanding paragraph (11), the Corporation, whether acting as such or as

conservator or receiver of an insured depository institution, may not avoid any transfer of money or other property in connection with any qualified financial contract with an insured depository institution.

(ii) Exception for certain transfers. Clause (i) shall not apply to any transfer of money or other property in connection with any qualified financial contract with an insured depository institution if the Corporation determines that the transferee had actual intent to hinder, delay, or defraud such institution, the creditors of such institution, or

any conservator or receiver appointed for such institution.

(D) Certain contracts and agreements defined. For purposes of this subsection--

(i) Qualified financial contract. The term "qualified financial contract" means any securities contract, commodity contract, forward contract, repurchase agreement, swap agreement, and any similar agreement that the Corporation determines by regulation to be a qualified financial contract for purposes of this paragraph.

(ii) Securities contract. The term "securities contract"--

(I) has the meaning given to such term in section 741(7) of title 11, United States Code, except that the term "security" (as used in such section) shall be deemed to include any mortgage loan, any mortgage-related security (as defined in section 3(a)(41) of the Securities Exchange Act of 1934 [15 USCS § 78c(a)(41)]), and any interest in any mortgage loan or mortgage-related security; and

(II) does not include any participation in a commercial mortgage loan unless the Corporation determines by regulation, resolution, or order to include any such participation within the meaning of such term.

(iii) Commodity contract. The term "commodity contract" has the meaning given to such term in section 761(4) of title 11, United States Code.

(iv) Forward contract. The term "forward contract" has the meaning given to such term in section 101(24) of title 11, United States Code.

(v) Repurchase agreement. The term "repurchase agreement"--

(I) has the meaning given to such term in section 101(41) of title 11, the United States Code, except that the items (as described in such section) which may be subject to any such agreement shall be deemed to

include mortgage-related securities (as such term is defined in section 3(a)(41) of the Securities Exchange Act of 1934 [15 USCS § 78c(a)(41)], any mortgage loan an any interest in any mortgage loan; and

(II) does not include any participation in a commercial mortgage loan unless the Corporation determines by regulation, resolution, or order to include any such participation within the meaning of such term.

(vi) Swap agreement. The term "swap agreement"--

(I) means any agreement, including the terms and conditions

incorporated by reference in any such agreement, which is a rate swap agreement, basis swap, commodity swap, forward rate agreement, interest rate future, interest rate option purchased, forward foreign exchange agreement, rate cap agreement, rate floor agreement, rate collar agreement, currency swap agreement, cross-currency rate swap agreement, currency future, or currency option purchased or any other similar agreement, and

(II) includes any combination of such agreements and any option to enter into any such agreement.

(vii) Treatment of master agreement as 1 swap agreement. Any master

agreement for any agreements described in clause (vi)(I) together with all supplements to such master agreement shall be treated as 1 swap agreement.

(viii) Transfer. The term "transfer" has the meaning given to such term in section 101(50) of title 11, United States Code.

(E) Certain protections in event of appointment of conservator. Notwithstanding any other provision of this Act (other than paragraph (12) of this subsection, subsection(d)(9) of this section, and section 13(c) of this Act [12 USCS § 1323(e)]), any other Federal law, or the law of any State, no person

shall be stayed or prohibited from exercising--

(i) any right such person has to cause the termination, liquidation, or acceleration of any qualified financial contract with a depository institution in a conservatorship based upon a default under such financial contract which is enforceable under applicable noninsolvency law;

(ii) any right under any security arrangement relating to such qualified financial contracts; or

(iii) any right to offset or net out any termination values, payment amounts, or other transfer

obligations arising under or in connection with such qualified financial contracts.

(9) Transfer of qualified financial contracts. In making any transfer of assets or liabilities of a depository institution in default which includes any qualified financial contract, the conservator or receiver for such depository institution shall either--

(A) transfer to 1 depository institution (other than a depository institution in default)

(i) all qualified financial contracts between--

(I) any person or any affiliate of such person: and

(II) the depository institution in default;

(ii) all claims of such person or any affiliate of such person against such depository institution under any such contract (other than any claim which, under the terms of any such contract, is subordinated to the claims of general unsecured creditors of such institution);

(iii) all claims of such depository institution against such person or any affiliate of such person under any such contract; and

(iv) all property securing any claim described in clause (ii) or (iii) under any such contract; or

(B) transfer none of the financial contracts, claims, or property referred to in subparagraph (A) (with respect to such person and any affiliate of such person).

(10) Notification of transfer.

(A) In general. If--

(i) the conservator or receiver for an insured depository institution in default makes any transfer of the assets and liabilities of such institution; and

(ii) the transfer includes any qualified financial contract, the conservator or receiver shall use such conservator's or receiver's best efforts to notify any person who is a party to any such contract of such transfer by 12:00, noon (local time) on the business day following such transfer.

(B) Business day defined. For purposes of this paragraph, the term "business day" means any day other than and Saturday, Sunday, or any day on which either the New York Stock Exchange or the Federal Reserve Bank of New York is closed.

(11) Certain security interests not avoidable. No provision of this

subsection shall be construed as permitting the avoidance of any legally enforceable or perfected security interest in any of the assets of any depository institution except where such an interest is taken in contemplation of the institution's insolvency or with the intent to hinder, delay, or defraud the institution or the creditors of such institution.

(12) Authority to enforce contracts.

(A) In general. The conservator or receiver may enforce any contract, other than a director's or officer's liability insurance contract or a depository institution bond, entered into by the depository institution notwithstanding any provision of the

contract providing for termination, default, acceleration, or exercise of rights upon, or solely by reason of, insolvency or the appointment of a conservator or receiver.

(B) Certain rights not affected. No provision of this paragraph may be construed as impairing or affecting any right of the conservator or receiver to enforce or recover under a directors or officers liability insurance contract or depository institution bond under other applicable law.

(13) Exception for Federal Reserve and Federal home loan banks. No provision of this subsection shall apply with respect to--

(A) any extension of credit from any Federal home loan bank or Federal Reserve bank to any insured depository institution; or

(B) any security interest in the assets of the institution securing any such extension of credit.

(f) Payment of insured deposits.

(1) In general. In case of the liquidation of, or other closing or winding up of the affairs of, any insured depository institution, payment of the insured deposits in such institution shall be made by the Corporation as soon as possible, subject to the provisions of subsection (g), either by cash or by making available to each depositor a

transferred deposit in a new insured depository institution in the same community or in another insured depository institution in an amount equal to the insured deposit of such depositor, except that--

(A) all payments made pursuant to this section on account of a closed Bank Insurance Fund member shall be made only from the Bank Insurance Fund, and

(B) all payments made pursuant to this section on account of a closed Savings Association Insurance Fund member shall be made only from the Savings Association Insurance Fund.

(2) Proof of claims. The Corporation, in its discretion, may

require proof of claims to be filed and may approve or reject such claims for insured deposits

(3) Resolution of disputes.

(A) Resolutions in accordance to Corporation regulations. In the case of any disputed claim relating to any insured deposit or any determination of insurance coverage with respect to any deposit, the Corporation may resolve such disputed claim in accordance with regulations prescribed by the Corporation establishing procedures for resolving such claims.

(B) Adjudication of claims. If the Corporation has not prescribed regulations establishing procedures for

resolving disputed claims, the Corporation may require the final determination of a court of competent jurisdiction before paying any such claim.

(4) Review of Corporation's determination. Final determination made by the Corporation shall be reviewable in accordance with chapter 7 of title 5, United States Code [5 USCS §§ 701 et seq.], by the United States Court of Appeals for the District of Columbia or the court of appeals for the Federal judicial circuit where the principal place of business of the depository institution is located.

(5) Statute of limitations. Any request for review of a final

determination by the Corporation shall be filed with the appropriate circuit court of appeals not later than 60 days after such determination is ordered.

(g) Subrogation of Corporation.

(1) In general. Notwithstanding any other provision of Federal law, the law of any State, or the constitution of any State, the Corporation, upon the payment to any depositor as provided in subsection (f) in connection with any insured depository institution or insured branch described in such subsection or the assumption of any deposit in such institution or branch by another insured depository institution pursuant to this section or section 13 [12 USCS § 1823], shall be subrogated to all rights of the

depositor against such institution or branch to the extent of such payment or assumption.

(2) Dividends on subrogated amounts. The subrogation of the Corporation under paragraph (1) with respect to any insured depository institution shall include the fight on the part of the Corporation to receive the same dividends from the proceeds of the assets of such institution and recoveries on account of stockholders' liability as would have been payable to the depositor on a claim for the insured deposit, but such depositor shall retain such claim for any uninsured or unassumed portion of the deposit.

(3) Waiver of certain claims. With respect to any bank which closes after May 25, 1938, the Corporation shall waive, in favor only of any person against whom stockholders' individual liability may be asserted, any claim on account of such liability in excess of the liability, if any, to the bank or its creditors, for the amount unpaid upon such stock in such bank; but any such waiver shall be effected in such manner and on such terms and conditions as will not increase recoveries or dividends on account of claims to which the Corporation is not subrogated.

(4) Applicability of State law. If the Corporation is appointed pursuant to subsection (c)(3), or determines not to invoke the authority conferred in

subsection (c)(4), the rights of depositors and other creditors of any State depository institution shall be determined in accordance with the applicable provisions of State law.

(h) Conditions applicable to resolution proceedings.

(1) Consideration of local economic impact required. The Corporation shall fully consider the adverse economic impact on local communities, including businesses and farms, of actions to be taken by it during the administration and liquidation of loans of a depository institution in default.

(2) Actions to alleviate adverse economic impact to be considered. The

actions which the Corporation shall consider include the release of proceeds from the sale of products and services for family living and business expenses and shortening the undue length of the decisionmaking process for the acceptance of offers of settlement contingent upon third party financing.

(3) Guidelines required. The Corporation shall adopt and publish procedures and guidelines to minimize adverse economic effects caused by its actions on individual debtors in the community.

(4) Financial services industry impact analysis. After the appointment of the Corporation as conservator or receiver for any insured depository

institution and before taking any action under this section or section 13 [12 USCS § 1823] in connection with the resolution of such institution, the Corporation shall--

(A) evaluate the likely impact of the means of resolution, and any action which the Corporation may take in connection with such resolution, on the viability of other insured depository institutions in the same community; and

(B) take such evaluation into account in determining the means for resolving the institution and establishing the terms and conditions for any such action.

(i) Valuation of claims in default.

(1) In general. Notwithstanding any other provision of Federal law or the law of any State and regardless of the method which the Corporation determines to utilize with respect to an insured depository institution in default or in danger of default, including transactions authorized under subsection (n) and section 13(c) [12 USCS § 1823(c)], this subsection shall govern the rights of the creditors (other than insured depositors) of such institution.

(2) Maximum liability. The maximum liability of the Corporation, acting as receiver or in any other capacity, to any person having a claim against the receiver or the insured depository institution for which such receiver is appointed shall equal the amount such

claimant would have received if the Corporation had liquidated the assets and liabilities of such institution without exercising the Corporation's authority under subsection (n) of this section or section 13 [12 USCS § 1823].

(3) Additional payments authorized.

(A) In general. The Corporation may, in its discretion and in the interests of minimizing its losses, use its own resources to make additional payments or credit additional amounts to or with respect to or for the account of any claimant or category of claimants. Notwithstanding any other provision of Federal or State law, or the constitution of any State, the Corporation shall not be obligated, as a result of having made

any such payment or credited any such amount to or with respect to or for the account of any claimant or category of claimants, to make payments to any other claimant or category or claimants.

(B) Source of funds. If the depository institution in default is a Bank Insurance Fund member, the Corporation may only make such payments out of funds held in the Bank Insurance Fund. If the depository institution in default is a Savings Association Insurance Fund member, the Corporation may only make such payments out of funds held in the Savings Association Insurance Fund.

(C) Manner of payment. The Corporation may make the payments or

credit the amounts specified in subparagraphs (A) and (B) directly to the claimants or may make such payments or credit such amounts to an open insured depository institution to induce such institution to accept liability for such claims.

(j) Limitation on court action. Except as provided in this section, no court may take any action, except at the request of the Board of Directors by regulation or order, to restrain or affect the exercise of powers or functions of the Corporation as a conservator or a receiver.

(k) Liability of directors and officers. A director or officer of an insured depository institution may be held personally liable for monetary damages in

any civil action by, on behalf of, or at the request or direction of the Corporation, which action is prosecuted wholly or partially for the benefit of the Corporation--

(1) acting as conservator or receiver of such institution,

(2) acting based upon a suit, claim, or cause of action purchased from, assigned by, or otherwise conveyed by such receiver or conservator, or

(3) acting based upon a suit, claim, or cause of action purchased from, assigned by, or otherwise conveyed in whole or in part by an insured depository institution or its affiliate in connection with assistance provided under section 13

[12 USCS § 1823], for gross negligence, including any similar conduct or conduct that demonstrates a greater disregard of a duty of care (than gross negligence) including intentional tortious conduct, as such terms are defined and determined under applicable State law. Nothing in this paragraph shall impair or affect any right of the Corporation under other applicable law.

(1) **Damages.** In any proceeding related to any claim against an insured depository institution's director, officer, employee, agent, attorney, accountant, appraiser, or any other party employed by or providing services to an insured depository institution, recoverable damages determined to result from the improvident or otherwise

improper use or investment of any insured depository institution's assets shall include principal losses and appropriate interest.

(m) New banks.

(1) Organization authorized. As soon as possible after the default of an insured bank, the Corporation, if it finds that it is advisable and in the interest of the depositors of the insured bank in default or the public shall organize a new national bank in the same community as the bank in default to assume the insured deposits of such bank in default and otherwise to perform temporarily the functions hereinafter provided for.

(2) Articles of association. The articles of association and the organization certificate of the new bank shall be executed by representatives designated by the Corporation.

(3) Capital stock. No capital stock need be paid in by the Corporation.

(4) Executive officer. The new bank shall not have a board of directors, but shall be managed by an executive officer appointed by the Board of Directors of the Corporation who shall be subject to its directions.

(5) Subject to laws relating to national banks. In all other respects the new bank shall be organized in accordance with the then existing

provisions of law relating to the organization of national banking associations.

(6) New deposits. The new bank may, with the approval of the Corporation, accept new deposits which shall be subject to withdrawal on demand and which, except where the new bank is the only bank in the community, shall not exceed $100,000 from any depositor.

(7) Insured status. The new bank, without application to or approval by the Corporation, shall be an insured depository institution and shall maintain on deposit with the Federal Reserve bank of its district reserves in the amount required by law for member banks, but it shall not be required to

subscribe for stock of the Federal Reserve bank.

(8) Investments. Funds of the new bank shall be kept on hand in cash, invested in obligations of the United States or obligations guaranteed as to principal and interest by the United States, or deposited with the Corporation, any Federal Reserve bank, or, to the extent of the insurance coverage on any such deposit, an insured depository institution.

(9) Conduct of business. The new bank, unless otherwise authorized by the Comptroller of the Currency, shall transact business only as authorized by this Act and as may be incidental to its organization.

(10) Exempt status. Notwithstanding any other provision of Federal or State law, the new bank, its franchise, property, and income shall be exempt from all taxation now or hereafter imposed by the United States, by any territory, dependency, or possession thereof, or by any State, county, municipality, or local taxing authority.

(11) Transfer of deposits.

(A) Upon the organization of a new bank, the Corporation shall promptly make available to it an amount equal to the estimated insured deposits of such bank in default plus the estimated amount of the expenses of operating the new bank, and shall determine as soon as possible the amount due each depositor

for the depositor's insured deposit in the bank in default, and the total expenses of operation of the new bank.

(B) Upon such determination, the amounts so estimated and made available shall be adjusted to conform, to the amounts so determined.

(12) Earnings. Earnings of the new bank shall be paid over or credited to the Corporation in such adjustment.

(13) Losses. If any new bank, during the period it continues its status as such, sustains any losses with respect to which it is not effectively protected except by reason of being an insured bank, the Corporation shall furnish to it

additional funds in the amount of such losses.

(14) Payment of insured deposits.

(A) The new bank shall assume as transferred deposits the payment of the insured deposits of such bank in default to each of its depositors.

(B) Of the amounts so made available, the Corporation shall transfer to the new bank, in cash, such sums as may be necessary to enable it to meet its expenses of operation and immediate cash demands on such transferred deposits, and the remainder of such amounts shall be subject to withdrawal by the new bank on demand.

(15) Issuance of stock.

(A) Whenever in the judgment of the Board of Directors it is desirable to do so, the Corporation shall cause capital stock of the new bank to be offered for sale on such terms and conditions as the Board of Directors shall deem advisable in an amount sufficient, in the opinion of the Board of Directors, to make possible the conduct of the business of the new bank on a sound basis, but in no event less than that required by section 5138 of the Revised Statutes [12 USCS §51] for the organization of a national bank in the place where such new bank is located.

(B) The stockholders of the insured bank in default shall be given

the first opportunity to purchase any shares of common stock so offered.

(16) Issuance of certificate. Upon proof that an adequate amount of capital stock in the new bank has been subscribed and paid for in cash, the Comptroller of the Currency shall require the articles of association and the organization certificate to be amended to conform to the requirements for the organization of a national bank, and thereafter, when the requirements of law with respect to the organization of a national bank have been complied with, the Comptroller of the Currency shall issue to the bank a certificate of authority to commence business, and thereupon the bank shall cease to have the status of a new bank, shall be managed by directors elected by

its own shareholders, may exercise all the powers granted by law, and shall be subject to all provisions of law relating to national banks. Such bank shall thereafter be an insured national bank, without certification to or approval by the Corporation.

(17) Transfer to other institution. If the capital stock of the new bank is not offered for sale or if an adequate amount of capital for such new bank is not subscribed and paid for, the Board of Directors may offer to transfer its business to any insured depository institution in the same community which will take over its assets, assume its liabilities, and pay to the Corporation for such business such amount as the Board of Directors may deem adequate; or

the Board of Directors in its discretion may change the location of the new bank to the office of the Corporation or to some other place or may at any time wind up its affairs as herein provided.

(18) Winding up. Unless the capital stock of the new bank is sold or its assets are taken over and its liabilities are assumed by an insured depository institution as above provided within 2 years after the date of its organization, the Corporation shall wind up the affairs of such bank, after giving such notice, if any, as the Comptroller of the Currency may require, and shall certify to the Comptroller of the Currency the termination of the new bank. Thereafter the Corporation shall be liable for the

obligations of such bank and shall be the owner of its assets.

(19) Applicability of certain laws. The provisions of sections 5220 and 5221 of the Revised Statutes [12 USCS §§ 181 and 182] shall not apply to a new bank under this subsection.

(n) Bridge banks.

(1) Organization.

(A) Purpose. When 1 or more insured banks are in default, or when the Corporation anticipates that 1 or more insured banks may become in default, the Corporation may, in its discretion, organize, and the Office of the Comptroller of the Currency shall

charter, 1 or more national banks with respect thereto with the powers and attributes of national bank associations, subject to the provisions of this subsection, to be referred to as bridge banks.

(B) Authorities. Upon the granting of a charter to a bridge bank, the bridge bank may--

(i) assume such deposits of such insured bank or banks that is or are in default or in danger of default as the Corporation may, in its discretion, determine to be appropriate, except that if any insured deposits of a bank are assumed, all insured deposits of that bank shall be assumed by the

bridge bank or another insured depository institution;

(ii) assume such other liabilities (including liabilities associated with any trust business) of such insured bank or banks that is or are in default or in danger of default as the Corporation may, in its discretion, determine to be appropriate;

(iii) purchase such assets (including assets associated with any trust business) of such insured bank or banks that is or are in default or in danger of default as the Corporation may, in its discretion, determine to be appropriate; and

(iv) perform any other temporary function which the Corporation may, in its discretion, prescribe in accordance with this Act.

(C) Articles of association. The articles of association and organization certificate of a bridge bank as approved by the Corporation shall be executed by 3 representatives designated by the Corporation.

(D) Interim directors. A bridge bank shall have an interim board of directors consisting of not fewer than 5 nor more than 10 members appointed by the Corporation.

(E) National bank. A bridge bank shall be organized as a national bank.

(2) Chartering.

(A) Conditions. A national bank may be chartered by the Comptroller of the Currency as a bridge bank only if the Board of Directors determines that-

(i) the mount which is reasonably necessary to operate such bridge bank will not exceed the amount which is reasonably necessary to save the cost of liquidating, including paying the insured accounts of, 1 or more insured banks in default or in danger of default with respect to which the bridge bank is chartered;

(ii) the continued operation of such insured bank or banks in default or

in danger of default with respect to which the bridge bank is chartered is essential to provide adequate banking services in the community where each such bank in default or in danger of default is located; or

(iii) the continued operation of such insured bank or banks in default or in danger of default with respect to which the bridge bank is chartered is in the best interest of the depositors of such bank or banks in default or in danger of default or the public.

(B) Insured national bank. A bridge bank shall be an insured bank from the time it is chartered as a national bank.

(C) Bridge bank treated as being in default for certain purposes. A bridge bank shall be treated as an insured bank in default at such times and for such purposes as the Corporation may, in its discretion, determine.

(D) Management. A bridge bank, upon the granting of its charter, shall be under the management of a board of directors consisting of not fewer than 5 nor more than 10 members appointed by the Corporation.

(E) Bylaws. The board of directors of a bridge bank shall adopt such bylaws as may be approved by the Corporation.

(3) Transfer of assets and liabilities.

(A) In general.

(i) Transfer upon grant of charter. Upon the granting of a charter to a bridge bank pursuant to this subsection, the Corporation, as receiver, or any other receiver appointed with respect to any insured bank in default with respect to which the bridge bank is chartered may transfer any assets and liabilities of such bank in default to the bridge bank in accordance with paragraph (1).

(ii) Subsequent transfers. At any time after a charter is granted to a

bridge bank, the Corporation, as receiver, or any other receiver appointed with respect to an insured bank in default may transfer any assets and liabilities of such insured bank in default as the Corporation may, in its discretion, determine to be appropriate in accordance with paragraph (1).

(iii) Treatment of trust business. For purposes of this paragraph, the trust business, including fiduciary appointments, of any insured bank in default is included among its assets and liabilities.

(iv) Effective without approval. The transfer of any assets or liabilities. including those

associated with any trust business, of an insured bank in default transferred to a bridge bank shall be effective without any further approval under Federal or State law, assignment, or consent with respect thereto.

(B) Intent of Congress regarding continuing operations. It is the intent of the Congress that, in order to prevent unnecessary hardship or losses to the customers of any insured bank in default with respect to which a bridge bank is chartered, especially creditworthy farmers, small businesses, and households, the Corporation should--

(i) continue to honor commitments made by the bank in default to creditworthy customers, and

(ii) not interrupt or terminate adequately secured loans which are transferred under subparagraph (A) and are being repaid by the debtor in accordance with the terms of the loan instrument.

(4) Powers of bridge banks. Each bridge bank chartered under this subsection shall have all corporate powers of, and be subject to the same provisions of law as, a national bank, except that--

(A) the Corporation may-

(i) remove the interim directors and directors of a bridge bank;

(ii) fix the compensation of members of the interim board of directors and the board of directors and senior management, as determined by the Corporation in its discretion, of a bridge bank; and

(iii) waive any requirement established under section 5145, 5146, 5147, 5148, or 5149 of the Revised Statutes [12 USCS § 71, 72, 73, 74, or 75] (relating to directors of national banks) or section 31 of the Banking Act of 1933 [12 USCS § 71a] which would otherwise be applicable with respect

to directors of a bridge bank by operation of paragraph (2)(B);

(B) the Corporation may indemnify the representatives for purposes of paragraph (1)(B) and the interim directors, directors, officers, employees, and agents of a bridge bank on such terms as the Corporation determines to be appropriate;

(C) no requirement under section 5138 of the Revised Statutes [12 USCS § 51] or any other provision of law relating to the capital of a national bank shall apply with respect to a bridge bank;

(D) the Comptroller of the Currency may establish a limitation on

the extent to which any person may become indebted to a bridge bank without regard to the amount of the bridge bank's capital or surplus;

(E) (i) the board of directors of a bridge bank shall elect a chairperson who may also serve in the position of chief executive officer, except that such person shall not serve either as chairperson or as chief executive officer without the prior approval of the Corporation;

(ii) the board of directors of a bridge bank may appoint a chief executive officer who is not also the chairperson, except that such person shall not serve as chief

executive officer without the prior approval of the Corporation;

(F) a bridge bank shall not be required to purchase stock of any Federal Reserve bank;

(G) the Comptroller of the Currency shall waive any requirement for a fidelity bond with respect to a bridge bank at the request of the Corporation;

(H) any judicial action to which a bridge bank becomes a party by virtue of its acquisition of any assets or assumption of any liabilities of a bank in default shall be stayed from further proceedings for a period of up to 45 days at the request of the bridge bank;

(I) no agreement which tends to diminish or defeat the right, title or interest of a bridge bank in any asset of an insured bank in default acquired by it shall be valid against the bridge bank unless such agreement--

(i) is in writing.

(ii) was executed by such insured bank in default and the person or persons claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by such insured bank in default,

(iii) was approved by the board of directors of such insured bank in default or its loan committee, which

approval shall be reflected in the minutes of said board or committee, and

(iv) has been, continuously from the time of its execution, an official record of such insured bank in default;

(J) notwithstanding section 13(e)(2) [12 USCS § 1823(e)(2)], any agreement relating to an extension of credit between a Federal home loan bank or Federal Reserve bank and any insured depository institution which was executed before the extension of credit by such bank to such depository institution shall be treated as having been executed contemporaneously with such extension of

credit for purposes of subparagraph (I); and

(K) except with the prior approval of the Corporation, a bridge bank may not, in any transaction or series of transactions, issue capital stock or be a party to any merger, consolidation, disposition of assets or liabilities, sale or exchange of capital stock, or similar transaction, or change its charter.

(5) Capital.

(A) No capital required. The Corporation shall not be required to--

(i) issue any capital stock on behalf of a bridge bank chartered under this subsection; or

(ii) purchase any capital stock of a bridge bank, except that notwithstanding any other provision of Federal or State law, the Corporation may purchase and retain capital stock of a bridge bank in such amounts and on such terms as the Corporation, in its discretion, determines to be appropriate.

(B) Operating funds in lieu of capital. Upon the organization of a bridge bank, and thereafter, as the Board of Directors may, in its discretion, determine to be necessary or advisable, the Corporation may make available to the

bridge bank, upon such terms and conditions and in such form and amounts as the Corporation may in its discretion determine, funds for the operation of the bridge bank in lieu of capital.

(C) Authority to issue capital stock. Whenever the Board of Directors determines it is advisable to do so, the Corporation shall cause capital stock of a bridge bank to be issued and offered for sale in such amounts and on such terms and conditions as the Corporation may, in its discretion, determine.

(6) No Federal status.

(A) Agency status. A bridge bank is not an agency, establishment, or instrumentality of the United States.

(B) Employee status.

Representatives for purposes of paragraph (1)(B), interim directors, directors, officers, employees, or agents of a bridge bank are not, solely by virtue of service in any such capacity, officers or employees of the United States. Any employee of the Corporation or of any Federal instrumentality who serves at the request of the Corporation as a representative for purposes of paragraph (1)(B), interim director, director, officer, employee, or agent of a bridge bank shall not-

(i) solely by virtue of service in any such capacity lose any existing status as an officer or employee of the United States for purposes of

title 5, United States Code, or any other provision of law, or

(ii) receive any salary or benefits for service in any such capacity with respect to a bridge bank in addition to such salary or benefits as are obtained through employment with the Corporation or such Federal instrumentality.

(7) Assistance authorized. The Corporation may, in its discretion, provide assistance under section 13(c) [12 USCS § 1823(c)] to facilitate any transaction described in clause (i), (ii), or (iii) of paragraph (10)(A) with respect to any bridge bank in the same manner and to the same extent as such assistance maybe provided under such

section with respect to an insured bank in default, or to facilitate a bridge bank's acquisition of any assets or the assumption of any liabilities of an insured bank in default.

(8) Acquisition.

(A) In general. The responsible agency shall notify the Attorney General of any transaction involving the merger or sale of a bridge bank requiring approval under section 18(c) [12 USCS § 1828(c)] and if a report on competitive factors is requested within 10 days, such transaction may not be consummated before the 5th calendar day after the date of approval by the responsible agency with respect thereto. If the responsible agency has found that it must act

immediately to prevent the probable failure of 1 of the banks involved, the preceding sentence does not apply and the transaction may be consummated immediately upon approval by the agency.

(B) By out-of-State holding company. Any depository institution, including an out-of-State depository institution holding company may acquire and retain the capital stock or assets of, or otherwise acquire and retain a bridge bank if the bridge bank at any time had assets aggregating $500,000,000 or more, as determined by the Corporation on the basis of the bridge bank's reports of condition or on the basis of the last available reports of condition of any insured bank in default, which institution has been acquired, or whose

assets have been acquired, by the bridge bank. The acquiring entity may acquire the bridge bank only in the same manner and to the same extent as such entity may acquire an insured bank in default under section 13(f)(2) [12 USCS § 1823(f)(2)].

(9) Duration of bridge bank. Subject to paragraphs (11) and (12), the status of a bridge bank as such shall terminate at the end of the 2-year period following the date it was granted a charter. The Board of Directors may, in its discretion, extend the status of the bridge bank as such for 3 additional I-year periods.

(10) Termination of bridge bank status. The status of any bridge bank as

such shall terminate upon the earliest of-

(A) the merger or consolidation of the bridge bank with a depository institution that is not a bridge bank;

(B) at the election of the Corporation, the sale of a majority of the capital stock of the bridge bank to an entity other than the Corporation and other than another bridge bank;

(C) the sale of 80 percent, or more, of the capital stock of the bridge bank to an entity other than the Corporation and other than another bridge bank;

(D) at the election of the Corporation, either the assumption of all or substantially all of the deposits and other liabilities of the bridge bank by a depository institution holding company or a depository institution that is not a bridge bank, or the acquisition of all or substantially all of the assets of the bridge bank by a depository institution holding company, a depository institution that is not a bridge bank, or other entity as permitted under applicable law; and

(E) the expiration of the period provided in paragraph (9), or the earlier dissolution of the bridge bank as provided in paragraph (12).

(11) Effect of termination events.

(A) Merger or consolidation. A bridge bank that participates in a merger or consolidation as provided in paragraph (10)(A) shall be for all purposes a national bank with all the rights, powers, and privileges thereof, and such merger or consolidation shall be conducted in accordance with, and shall have the effect provided in, the provisions of applicable law.

(B) Charter conversion. Following the sale of a majority of the capital stock of the bridge bank as provided in paragraph (10)(B), the Corporation may amend the charter of the bridge bank to reflect the termination of the status of the bridge bank as such,

whereupon the bank shall remain a national bank, with all of the rights, powers, and privileges thereof, subject to all laws and regulations applicable thereto.

(C) Sale of stock. Following the sale of 80 percent or more of the capital stock of a bridge bank as provided in paragraph (10)(C), the bank shall remain a national bank, with all of the rights, powers, and privileges thereof, subject to all laws and regulations applicable thereto.

(D) Assumption of liabilities and sale of assets. Following the assumption of all or substantially all of the liabilities of the bridge bank, or the sale of all or substantially all of the

assets of the bridge bank, as provided in paragraph (10)(D), at the election of the Corporation the bridge bank may retain its status as such for the period provided in paragraph (9).

(E) Effect on holding companies. A depository institution holding company acquiring a bridge bank under section 13(f) [12 USCS § 1823(f)], paragraph (8)(B) (or any predecessor provision), or both provisions, shall not be impaired or adversely affected by the termination of the status of a bridge bank as a result of subparagraph (A), (B), (C), or (D) of paragraph (10), and shall be entitled to the rights and privileges provided in section 13(f)[12 § 1823(f)].

(F) Amendments to charter. Following the consummation of a transaction described in subparagraph (A), (B), (C), or (D) of paragraph (10), the charter of the resulting institution shall be amended to reflect the termination of bridge bank status, if appropriate.

(12) Dissolution of bridge bank.

(A) In general. Notwithstanding any other provision of State or Federal law, if the bridge bank's status as such has not previously been terminated by the occurrence of an event specified in subparagraphs (A), (B), (C), or (D) of paragraph (10)--

(i) the Board of Directors may, in its discretion, dissolve a bridge bank in accordance with this paragraph at any time; and

(ii) the Board of Directors shall promptly commence dissolution proceedings in accordance.with this paragraph upon the expiration of the 2-year period following the date the bridge bank was chartered, or any extension thereof, as provided in paragraph (9).

(B) Procedures. The Comptroller of the Currency shall appoint the Corporation receiver for a bridge bank upon certification by the Board of Directors to the Comptroller of the

Currency of its determination to dissolve the bridge bank. The Corporation as such receiver shall wind up the affairs of the bridge bank in conformity with the provisions of law relating to the liquidation of closed national banks. With respect to any such bridge bank, the Corporation as such receiver shall have all the rights, powers, and privileges and shall perform the duties related to the exercise of such rights, powers, or privileges granted by law to a receiver of any insured depository institution and notwithstanding any other provision of law in the exercise of such rights, powers, and privileges the Corporation shall not be subject to the direction or supervision of any State agency or other Federal agency.

(13) Multiple bridge banks. Subject to paragraph (1)(B)(i), the Corporation may, in the Corporation's discretion organize 2 or more bridge banks under this subsection to assume any deposits of, assume any other liabilities of, and purchase any assets of a single bank in default.

(o) Supervisory records. In addition to the requirements of section 7(a)(2) [12 USCS § 1817(a)(2)] to provide to the Corporation copies of reports of examination and reports of condition. whenever the Corporation has been appointed as receiver for an insured depository institution, the appropriate Federal banking agency shall make available all supervisory records to the receiver which may be used by the

receiver in any manner the receiver determines to be appropriate.

(p) Certain convicted debtors prohibited from purchasing assets.

(1) Convicted debtors. Except as provided in paragraph (2), any individual who--

(A) has been convicted of an offense under section 215, 656, 657, 1005, 1006, 1007, 1008, 1014, 1032. 1341, 1343, or 1344 of title 18, United States Code, or of conspiring to commit such an offense, affecting any insured depository institution for which any conservator or receiver has been appointed; and

(B) is in default on any loan or other extension of credit from such insured depository institution which, if not paid, will cause substantial loss to the institution, any deposit insurance fund, the Corporation, the FSLIC Resolution Fund, or the Resolution Trust Corporation.

may not purchase any asset of such institution from the conservator or receiver.

(2) Settlement of claims. Paragraph (1) shall not apply to the sale or transfer by the Corporation of any asset of any insured depository institution to any individual if the sale or transfer of the asset resolves or

settles, or is pan of the resolution or settlement, of--

(A) 1 or more claims that have been, or could have been, asserted by the Corporation against the individual; or

(B) obligations owed by the individual to any insured depository institution, the FSLIC Resolution Fund, the Resolution Trust Corporation, or the Corporation.

(q) Expedited procedures for certain claims.

(1) Time for filing notice of appeal. The notice of appeal of any order, whether interlocutory or final, entered in any case brought by the

Corporation against an insured depository institution's director, officer, employee, agent, attorney, accountant, or appraiser or any other person employed by or providing services to an insured depository institution shall be filed not later than 30 days after the date of entry of the order. The hearing of the appeal shall be decided not later than 120 days after the date of the notice of appeal. The appeal shall be decided not later than 180 days after the date of the notice of appeal.

(2) Scheduling. Consistent with section 1657 of title 18 [28], United States Code, a court of the United States shall expedite the consideration of any case brought by the Corporation against an insured depository institution's

director, officer, employee, agent, attorney, accountant, or appraiser or any other person employed by or providing services to an insured depository institution. As far as practicable the court shall give such case priority on its docket.

(3) Judicial discretion. The court may modify the schedule and limitations stated in paragraphs (1) and (2) in a particular case, based on a specific finding that the ends of justice that would be served by making such a modification would outweigh the best interest of the public in having the case resolved expeditiously.

(r) Foreign investigations. The Corporation and the Resolution Trust

Corporation, as conservator or receiver of any insured depository institution and for purposes of carrying out any power, authority, or duty with respect to an insured depository institution--

(1) may request the assistance of any foreign banking authority and provide assistance to any foreign banking authority in accordance with section 8(v) [12 USCS § 1818(v)]; and

(2) may each maintain an office to coordinate foreign investigations or investigations on behalf of foreign banking authorities.

(s) Prohibition on entering secrecy agreements and protective orders. The Corporation may not enter into any

agreement or approve any protective order which prohibits the Corporation from disclosing the terms of any settlement of an administrative or other action for damages or restitution brought by the Corporation in its capacity as conservator or receiver for an insured depository institution.

(t) Agencies may share information without waiving privilege.

(1) In general. A covered agency shall not be deemed to have waived any privilege applicable to any information by transferring that information to or permitting that information to be used by--

(A) any other covered agency, in any capacity; or

(B) any other agency of the Federal Government (as defined in section 6 of title 18, United States Code).

(2) Definitions. For purposes of this subsection:

(A) Covered agency. The term "covered agency" means any of the following:

(i) Any appropriate Federal banking agency.

(ii) The Resolution Trust Corporation.

(iii) The Farm Credit Administration.

(iv) The Farm Credit System Insurance Corporation.

(v) The National Credit Union Administration.

(B) Privilege. The term "privilege" includes any work-product, attorney-client, or other privilege recognized under Federal or State law.

(3) Rule of construction. Paragraph (1) shall not be construed as implying that any person waives any privilege applicable to any information because paragraph (1) does not apply to the transfer or use of that information.

Supreme Court, U.S.
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No. 93-1055

In the Supreme Court of the United States

OCTOBER TERM, 1993

LEONARD SHANE, PETITIONER

v.

RESOLUTION TRUST CORPORATION, AS RECEIVER OF MERCURY SAVINGS AND LOAN ASSOCIATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner's pension rights vested before the Resolution Trust Corporation terminated his right to receive them.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A6) is unpublished, but the decision is noted at 996 F.2d 1227 (Table). The order of the district court (Pet. App. B1-B3) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 30, 1993. A petition for rehearing was denied on August 30, 1993. Pet. App. C1. The petition for a writ of certiorari was filed on November 29, 1993 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This case involves petitioner's claim for pension benefits connected with his service as chief executive officer of Mercury Savings & Loan Association from 1964 until 1990. He was still employed at the time the Resolution Trust Corporation became receiver of the institution on February 23, 1990. See Pet. 6-7, 9-10.

Petitioner's claim involves Mercury's Supplemental Executive Retirement Plan. Three provisions of that plan are relevant to petitioner's claim for benefits. First, the plan provided that, "[n]otwithstanding any of the other provisions of the plan, no benefit shall accrue or vest hereunder with respect to any executive or beneficiary until such benefit is in pay status." Pet. 6-7. Section 3 of the plan also stated that an individual would not be eligible to participate in the plan until he "(a) reaches Normal Retirement Age while employed by the Association and retires on or after such date; or (b) has voluntarily retired from the Association after reaching age 55 and completing at least 15 years of Service." Pet. App. A4-A5 (omitting emphasis added by court of appeals). Finally, Section 5(b) provided that benefits would commence "on the first month following the Participant's retirement." *Id.* at A5-A6.

2. Petitioner brought this action against the Resolution Trust Corporation as receiver (RTC) in the United States District Court for the Central District of California, seeking to recover benefits under the plan. The district court granted the RTC's motion for summary judgment in a brief order (Pet. App. B1-B3), explaining only that it had "found that there is no genuine issue as to any material fact." *Id.* at B2.

3. The court of appeals affirmed. Pet. App. A1-A6. The court stated that "[s]tripped to its essentials, this

case boils down to whether [petitioner]'s rights to the disputed benefits had vested prior to the RTC's termination of his contract" and held that "[u]nder the controlling language of the Plan, it [was] clear they did not." *Id.* at A3-A4. The court explained that benefits could not vest until they were in "pay status," and concluded that "it is clear that 'pay status' can only be understood as 'being paid.'" *Id.* at A4.

After reviewing the relevant provisions of the plan, the court concluded that "for [petitioner]'s benefits to have vested, he would have had to retire," Pet. App. A4, because "the Plan requires that the executive retire to receive payment," *id.* at A6. Because petitioner "had not retired at the time the RTC took over Mercury," his benefits had not vested and accordingly the RTC had authority to deny benefits to him. *Ibid.* (citing 12 C.F.R. 563.39).

ARGUMENT

1. Much of the petition (Pet. 16-26, 42-55) contends that the court of appeals erred because its decision deprived petitioner of benefits that had vested before the RTC terminated his rights to those benefits. The decision of the court of appeals, however, rested on its holding that petitioner's benefits had not in fact vested before that time, because petitioner had not satisfied all of the conditions for receiving them—specifically, the benefits were not yet in "pay status" because petitioner had not yet retired.

2. None of petitioner's arguments casts serious doubt on the court of appeals' conclusion that the plan makes retirement a condition of payment and of vesting, and that petitioner's failure to have retired therefore bars him from receiving benefits under the plan.

a. First, petitioner's argument (Pet. 27-38) that the district court erred in failing to consider extrinsic evidence regarding the meaning of the plan ignores the court's express conclusion that the language of the plan was not ambiguous. Compare, *e.g.*, *Pacific Gas & Electric Co.* v. *G.W. Thomas Drayage & Rigging Co.*, 442 P.2d 641, 644 (Cal. 1968) (discussed at Pet. 31-35) (parol evidence inadmissible unless offered "to prove a meaning to which the language of the instrument is reasonably susceptible"). For the reasons explained by the court of appeals, the plan is not reasonably susceptible to the interpretation offered by petitioner. In any event, the question whether there was ambiguity in the language of this particular retirement plan is not an issue that warrants review by this Court.

b. Second, petitioner argues (Pet. 39-41) that the lower court erred in ignoring genuine issues of material fact about his employment status after the seizure. Specifically, he contends that the RTC requested that he continue at Mercury for full pay for some period of time after the seizure. Whatever the merits of that contention, it does not undermine the undisputed facts on which the judgment below rested: Petitioner had not retired when the RTC took control of the institution and terminated his right to the benefits, and therefore his benefits had not vested at that time. The nature of his work for the institution after that time is not material to the analysis of the lower courts.

3. Petitioner also argues (Pet. 55-63) that the applicable regulations do not give the RTC the authority to terminate his benefits. The regulation on which the court of appeals relied requires any employment contract with a covered institution to permit the RTC to terminate the contract if the institution fails, subject to a provision that "[a]ny rights of the parties that have

already vested * * * shall not be affected by such action." 12 C.F.R. 563.39(b)(5). Petitioner argues that Section 563.39 does not authorize the RTC to terminate employee pension benefits, contending that 12 C.F.R. 563.47 is the provision that governs the RTC's termination of pension plans.[1]

That claim is meritless. Section 563.39 deals with the RTC's right to terminate individual employment contracts, and its structure suggests that the right granted by that provision carries with it the right to terminate an employee's ongoing right to receive unvested fringe benefits; otherwise the exception permitting vested benefits to continue would be surplusage.[2] Section 563.47, by contrast, deals with a different power, the RTC's power to terminate an entire pension plan. Termination of an entire plan, of course, would not necessarily result in termination of the employees' individual rights to receive benefits, because the trustee of the plan would remain obligated to distribute whatever funds were in the plan at the time of termination to pay vested benefits

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[1] It is difficult to discern the point of petitioner's reliance on 12 C.F.R. 563.47, because that provision, like Section 563.39, empowers the RTC to terminate the arrangements that it covers. The most important difference appears to be a requirement that the RTC give 60 days' notice before terminating an entire plan under Section 563.47, where Section 563.39 allows it to terminate individuals' claims to unvested benefits immediately.

[2] See *Modzelewski* v. *RTC*, No. 92-15670 (9th Cir. Jan. 20, 1994), slip op. 536-537 (rejecting the argument that Section 563.47 bars the RTC from terminating individual pension benefits immediately upon taking control of a failed institution and explaining that "[p]ensions and other deferred compensation arrangements are benefits of employment—not all that different from salaries and other fringe benefits. As such, they are subject to termination when the RTC takes over, except to the extent the right to receive them has become vested.").

covered by the plan.[3] Because this case involves a termination of petitioner's individual benefits, rather than a termination of an entire plan (cf. Pet. 10, noting that petitioner was the only employee whose claim for benefits under the plan was denied), the court of appeals properly concluded that Section 563.39—rather than Section 563.47—was the governing provision.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[3] See 29 U.S.C. 1103(c) (1988 & Supp. IV 1992) (assets of an ERISA plan "shall never inure to the benefit of any employer and shall be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan").